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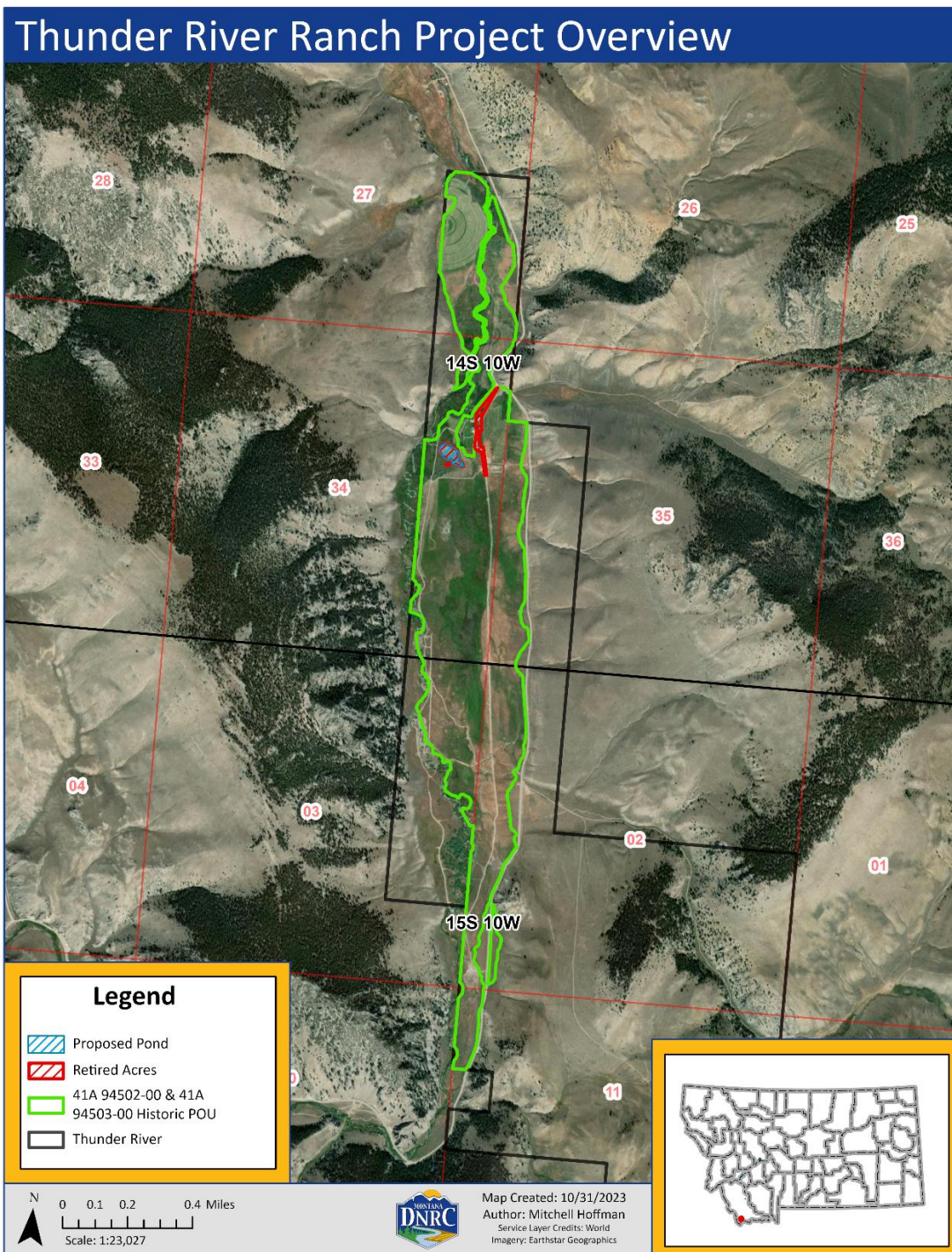


Figure 1: Project Overview

Preliminary Determination to Grant  
Combined Application nos. 41A 30154952, 41A 30154953 & 41A 30159796.

## Thunder River Ranch Proposed Pond

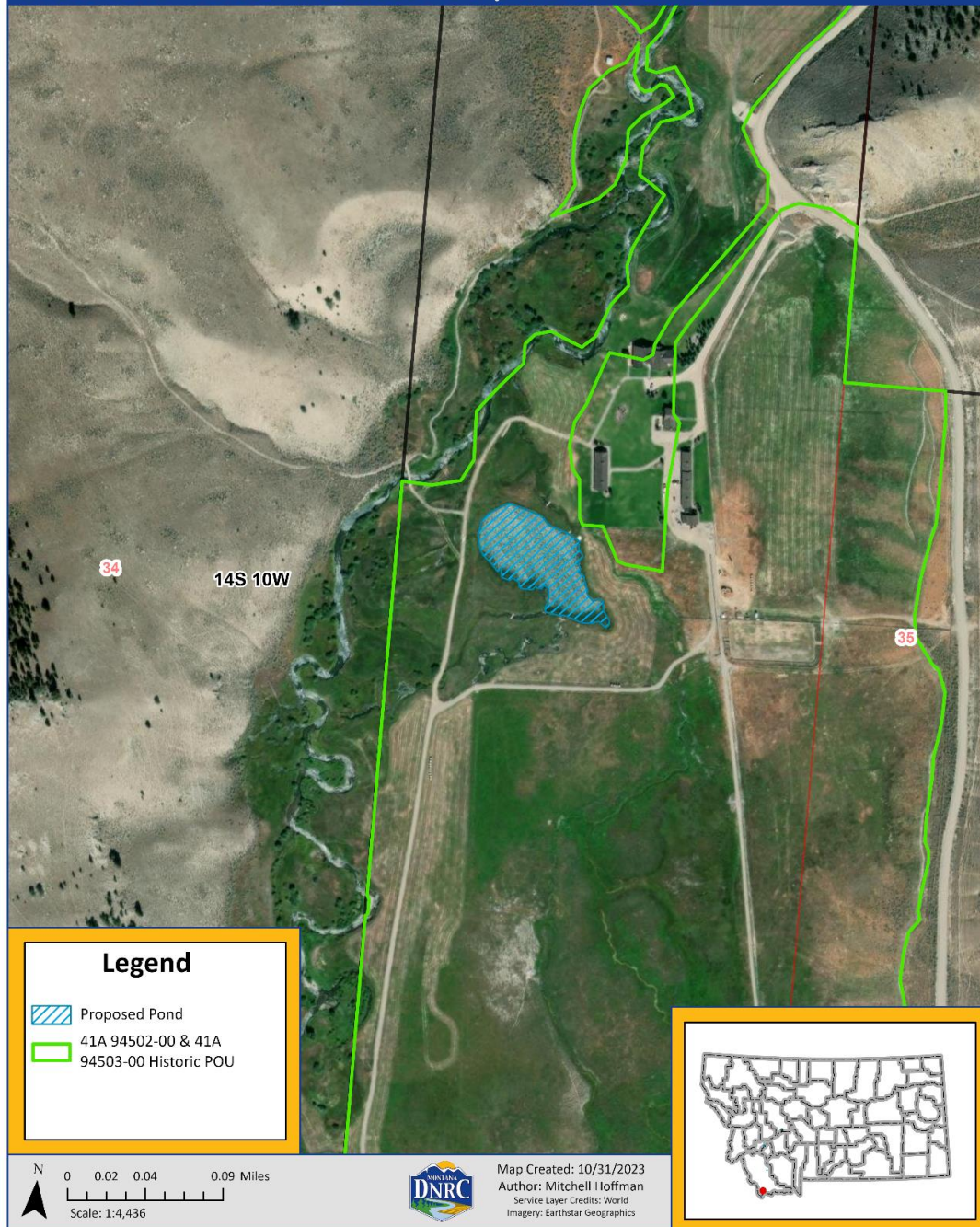


Figure 2: Proposed Pond

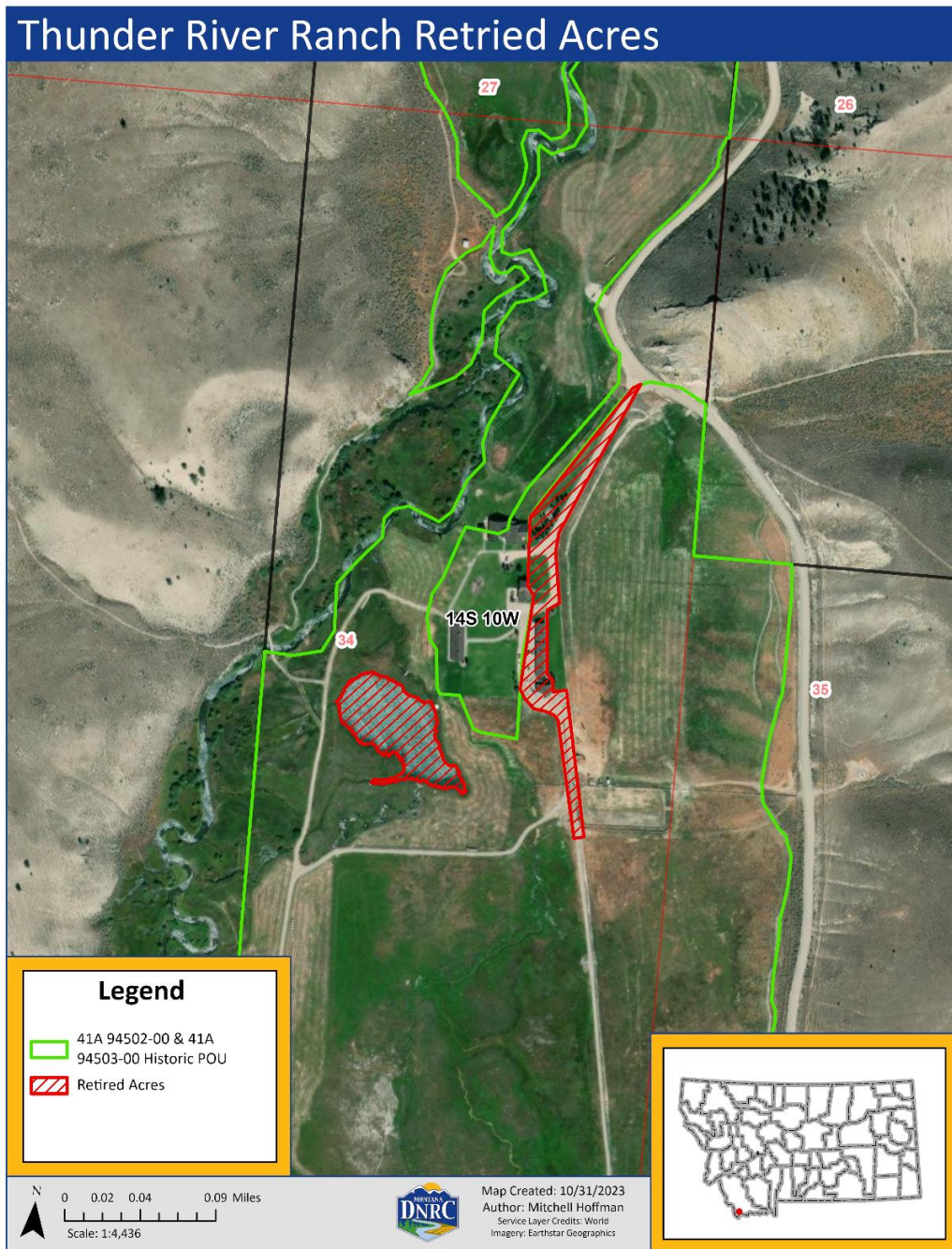


Figure 3: Retired Acres

## **INFORMATION**

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

### **Application as filed:**

- Application for Beneficial Water Use Permit, Form 600 (Permit no. 41A 30154952)
- Application to Change, Form 606 (Change no. 41A 30154953)
- Attachments
- Maps: Aerial Imagery for pond specifications, historic imagery of irrigation, ditch diversion, cross section and longitudinal profile, proposed use for irrigation and retired acres
- Copy of Aquifer Testing Variance Approval Letter Dated November 17, 2021
- Form 600-BCA Basin Closure Area Addendum
- Form 600-SA Reservoir/Place of Storage Addendum
- Form 606-PA Change of Purpose
- Sage Grouse Habitat Project Review

### **Information Received after Application Filed**

- Deficiency letter response dated August 8, 2022
- Shapefiles for the proposed and historic place of use (POU), email dated August 14, 2022
- Montana Water Court Upper Missouri Division Red Rock River Basin (41A), Notice of Filing of Master's Report, dated September 7, 2022
- Montana Water Court Upper Missouri Division Red Rock River Basin (41A), Order Adopting Master Report, dated September 22, 2022
- Amendments dated February 21, 2023
- Application to Change, Form 606 (Change no. 41A 30159796)
- Attachments
- Amended Maps

### **Information within the Department's Possession/Knowledge**

- Aerial photos and topographic maps
- Water right records, including file for the statement of claims proposed to be changed
- USDA Web Soil Survey
- USGS SteamStats Report, dated May 13, 2022
- DNRC Technical Report dated December 1, 2022
- DNRC Groundwater Permit with Mitigation Report dated June 1, 2023
- DNRC Technical Report dated August 4, 2023
- Montana Cadastral
- Environmental Assessment dated November 29, 2023
- The following information is not included in the administrative file for this Application but is available upon request. Please contact the Helena Regional Office at 406-444-6999 to request copies of the following documents.
  - Return Flow Memo dated April 1, 2016
  - Consumptive Use Methodology Memo dated March 17, 2010
  - Historic Diverted Volume Memo dated September 13, 2012
  - Assessment of New Consumptive use and Irrecoverable Losses Associated With Change Applications Memo dated April 15, 2013
  - DNRC Pond and Wetland Evaporation/Evapotranspiration Memorandum

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

## BASIN CLOSURE

### FINDINGS OF FACT

1. The Application for Beneficial Water Use Permit no. 41A 30154952 is for fisheries with a requested volume of 19.2 AF groundwater fed pond. This application is located within the Upper Missouri River and Jefferson-Madison River Legislative Closures.

2. Applicant submitted a hydrogeologic assessment and a mitigation plan determined to be correct and complete by Department staff.

### CONCLUSIONS OF LAW

3. DNRC cannot grant an application for a permit to appropriate water within the Upper Missouri River basin until final decrees have been issued in accordance with Title 85, chapter 2, part 2, MCA, for all of the sub-basins of the Upper Missouri River basin. § 85-2-343(1), MCA. The Upper Missouri River basin consists of the drainage area of the Missouri River and its tributaries above Morony Dam. (§ 85-2-342(4), MCA). The proposed pond is located within the Upper Missouri River basin closure area.

4. Pursuant to § 85-2-362, MCA, a combined application for new appropriations of groundwater in a closed basin shall consist of a hydrogeologic assessment with an analysis of net depletion, a mitigation plan or aquifer recharge plan if required, an application for a beneficial water use permit or permits, and an application for a change in appropriation right or rights if necessary. A combined application must be reviewed as a single unit. A beneficial water use permit may not be granted unless the accompanying application for a change in water right is also granted. A denial of either results in a denial of the combined application. § 85-2-363, MCA. ARM 36.12.120. E.g., *In the Matter of Application no. 76H-30046211 for a Beneficial Water Use Permit and Application no. 76H-30046210 to Change a Non-filed Water Right by Patricia Skergan and Jim Helmer* (DNRC Final Order 2010, Combined Application)(combined application under §85-2-363, MCA, reviewed as a single unit).

5. The proposed fisheries pond is located within the Upper Missouri River basin closure area. This Application is to appropriate groundwater and the surface water depletions are proposed to be mitigated. Therefore, the Application falls under the exceptions for the basin closure, 85-2-343 and 85-2-360, MCA.

6. In reviewing an application for groundwater in a closed basin, the District Court in Sitz Ranch v. DNRC observed:

The basin from which applicants wish to pump water is closed to further appropriations by the legislature. The tasks before an applicant to become eligible for an exception are daunting. The legislature set out the criteria discussed above (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting. It is inescapable that an applicant to appropriate water in a closed basin must withstand strict scrutiny of each of the legislatively required factors.

Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) P.g. 7.

# A basin closure exception does not relieve the Department of analyzing § 85-2-311, MCA criteria. Qualification under a basin closure exception allows the Department to accept an application for processing. The Applicant must still prove the requisite criteria. *E.g., In The Matter of Application for Beneficial Water Use Permit no. 41K-30043385 by Marc E. Lee* (DNRC Final Order 2011); *In The Matter of Application for Beneficial Water Use Permit no. 41K-30045713 by Nicholas D. Konen*, (DNRC Final Order 2011)

### **§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA**

#### **GENERAL CONCLUSIONS OF LAW**

7. The Montana Constitution expressly recognizes in relevant part that:
  - (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
  - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
  - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

(1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .

(3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

8. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation

works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35.

9. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, *In the Matter of Application for Beneficial Water Use Permit no. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if in further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit no. 42M-80600 and Application for Change of Appropriation Water Right no. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin R. Mont. (ARM) 36.12.207.

10. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order* (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

11. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

12. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

### **PROPOSED APPROPRIATION**

#### **BENEFICIAL WATER USE PERMIT NO. 41A 30154952**

#### **FINDINGS OF FACT**

13. The Applicant proposes to divert groundwater by means of a pond, from January 1 to December 31 up to 19.2 AF, from a point located in the W2SENE of Section 34, T14S, R10W, Beaverhead County, for the purpose of fisheries from January 1 through December 31 of each year. The proposed place of use is generally located in the SENE of Section 34, T14S, R10W, Beaverhead County. (Figures 1-3)

14. The Applicant is requesting 19.2 acre-feet (AF) (15.7 AF capacity + 3.5 AF net evaporation). The pond has a surface area of 1.8 acres and has a maximum depth of 16.5 ft. Yearly net evaporation from April 1 to October 31 is 23.0 inches or 1.92 ft as calculated in DNRC Memorandum titled Pond and Wetland Evaporation/Evapotranspiration dated November 8, 2019, and the Lima weather station. Evaporation off the pond is 3.45 AF per year (1.8 acres x 1.92 ft = 3.45 AF), rounded to 3.5 AF.
15. Big Sheep Creek is 200 feet west of the pond location and is determined to be hydraulically connected to the source aquifer. Net depletion off the pond during the non-freezing period occurs as propagation of drawdown through the unconfined aquifer. (Groundwater Permit with Mitigation Report by Melissa Brickl, Groundwater Hydrologist, Water Sciences Bureau, p.g. 3, 10-14). According to DNRC's freezing degree methodology and using the Lima, MT weather station, the freezing period starts November 6 and ends March 22, which the Department rounds to November 1 through April 1.
16. The application will be subject to the following conditions, limitations, or restrictions.
- MITIGATION REQUIREMENT: THE APPROPRIATOR'S USE OF WATER UNDER THIS PERMIT IS CONDITIONED UPON THE 3.5 AC-FT OF MITIGATION VOLUME REQUIRED TO OFFSET ADVERSE EFFECTS FROM NET DEPLETION TO THE BIG SHEEP CREEK DURING APRIL-OCTOBER AT W2SENE SEC 34 14S 10W. DIVERSION UNDER THIS PERMIT MAY NOT COMMENCE UNTIL THE MITIGATION PLAN AS SPECIFICALLY DESCRIBED IN CHANGE AUTHORIZATION NOS. 41A 30154953 AND 41A 30159796 ARE AUTHORIZED AND IMPLEMENTED. DIVERSION UNDER THIS PERMIT MUST STOP IF MITIGATION AS HEREIN REQUIRED IN AMOUNT, LOCATION AND DURATION CEASES.

### **Physical Availability**

#### **FINDINGS OF FACT**

17. In a letter dated November 17, 2021, The Department granted the Applicant's request for a variance from ARM 36.12.121, Aquifer Testing Requirements because the diversion is a groundwater pit, and pump testing would not result in sufficient data to quantify physical availability. Instead, physical availability has been assessed based on AQTESOLV® (HydroSOLVE, Inc., 2007), an analytical modeling software that uses image well theory and the principle of superposition to simulate aquifer stress tests.

18. The Department conducted an evaluation of physical groundwater availability by calculating groundwater flux through the zone of influence (ZOI). The model predicts the 0.01-foot drawdown contour or zone of influence (ZOI) will occur 3,800 feet (ft) from the pond, truncated at no-flow boundaries to 2,000 ft. The groundwater flux through the ZOI is equal to 4,000 ft<sup>3</sup>/day or 33.5 AF/year. (Groundwater Permit with Mitigation Report, Melissa Brickl, Groundwater Hydrologist, Water Sciences Bureau, p.g. 2-3).

19. The Theis (1935) solution was used to generate a model of drawdown in existing wells. The following inputs were used:  $T = 1,000 \text{ ft}^2/\text{day}$ ,  $S_y = 0.1$ , and a monthly pumping schedule derived from monthly net evaporation values (Table 3) for a period of five years. Drawdown is the largest at the end of the fifth July of the fifth year using the proposed pumping schedule and is equal to 0.28 ft. Drawdown in excess of 1-foot is not predicted to occur in the source aquifer. (Groundwater Permit with Mitigation Report, Melissa Brickl, Groundwater Hydrologist, Water Sciences Bureau, p.g. 8-9).

20. An error exists within the Technical Report dated 8/4/2023, on page 2 the surface water depletions should reference Table 4, not Table 5.

21. The Department finds that water is physically available at the proposed point of diversion in the amount the Applicant seeks to appropriate.

### CONCLUSIONS OF LAW

22. Pursuant to § 85-2-311(1)(a) (i), MCA, an applicant must prove by a preponderance of the evidence that "there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate."

An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit no. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit no. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

23. The Department concludes that the Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 17-21).

### **Legal Availability**

#### **FINDINGS OF FACT**

24. There is one existing groundwater right for 11.05 AF (Table 1) that is completed in the source aquifer within the ZOI. Subtracting legal demands from the calculated groundwater flux results in 22.45 AF per year remaining. (Table 2)

Table 1: Groundwater Rights within the Zone of Influence

<b>Water Right</b>	<b>Volume Diverted (AF)</b>
41A 72377-00	11.05
<b>Total Volume (AF)</b>	<b>11.05</b>

Table 2: Groundwater Comparison

<b>Physically Available (AF/year)</b>	<b>Existing Legal Demands (AF/year)</b>	<b>Physically Available-Existing Legal Demands (AF/year)</b>
33.5	11.05	22.45

25. The consumed volume of the proposed permit is equal to the net evaporation of the pond. This evaporation is presumed to be zero during the months when the pond is more likely than not to be frozen (per DNRC Pond and Wetland Evaporation/Evapotranspiration Memorandum). This was assessed using historic weather data from Lima MT. According to this data, the freezing period starts on November 6<sup>th</sup> and ends on March 22<sup>nd</sup> (rounded here to the closest whole month,

November-April). For these months consumed volume is presumed to be zero, and legal availability has not been assessed.

26. The source aquifer is hydraulically connected to Big Sheep Creek which lies 200 ft west of the proposed pond site. Net depletion is equal to the consumption for the proposed groundwater use based on the concept that groundwater pumping, eventually is offset by an equivalent increase in recharge or decrease in discharge. Capture occurs as drawdown propagates to surface water; the Department assumes the net depletion is equal to the total capture. Aquifer properties were identified and used in forward modeling to evaluate effects to existing groundwater rights. Adverse effect to existing surface water rights is evaluated by comparing net depletions and return flows to surface water for existing and proposed conditions. (Groundwater Permit with Mitigation Report by Melissa Brickl, Groundwater Hydrologist, Water Sciences Bureau, p.g. 2)

27. The Department used the following parameters to determine net depletion on Big Sheep Creek, an aquifer transmissivity (T) of 1,000 ft<sup>2</sup>/day; specific yield of 0.1 for an unconfined gravel and aquifer (Lohman, 1972); and the consumption equal to the annual evaporation off the proposed pond.

28. For a pond with a surface area of 1.8 acres, the calculated evaporation rate is 3.5 AF per year. Calculated consumption and modeled depletions to Big Sheep Creek are reported in Table 3 below.

Table 3: Consumption and Net Depletions to Big Sheep Creek (Groundwater Permit with Mitigation Report, Melissa Brickl, Groundwater Hydrologist, Water Sciences Bureau)

<b>Month</b>	<b>Net Evaporation - Consumed Volume (AF)</b>	<b>Big Sheep Creek Net Depletion -(AF)</b>
January	0	0*
February	0	0*
March	0	0*
April	0.3	0.3
May	0.3	0.3
June	0.4	0.4
July	0.7	0.7
August	0.7	0.7
September	0.6	0.6

October	0.4	0.4
November	0	0*
December	0	0*
<b>Total</b>	<b>3.5</b>	<b>3.5</b>

*\* Modeled monthly depletions less than 0.1 AF were moved to the nearest months with depletions equal to or greater than 0.1 AF. As such, months with depletions less than 0.1 AF became zero.*

29. The Applicant has addressed legal availability of surface water by providing a mitigation plan which proposes to mitigate the depletions to surface water in full. This mitigation plan is fully addressed under “Adverse Effect” below.

30. The physical seasonal flow on the hydraulically connected surface water Big Sheep Creek (Groundwater Permit with Mitigation Report by Melissa Brickl, Groundwater Hydrologist, Water Sciences Bureau, p.g. 3) has not been assessed, as the mitigation plan detailed in Change Applications nos. 41A 30154953 and 41A 30159796 mitigate all modeled depletions to the Creek.

31. Note that there is an error within the Technical Report dated 8/4/2023, on page 4 the surface water depletions should reference Table 4, not Table 5.

32. The Department finds that groundwater is legally available in the amount the Applicant proposes to appropriate.

### CONCLUSIONS OF LAW

33. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

- (A) identification of physical water availability;
- (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
- (C) analysis of the evidence on physical water availability and the existing legal demands,

including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit no. 81705-g76F by Hanson* (DNRC Final Order 1992).

34. It is the applicant's burden to present evidence to prove water can be reasonably considered legal available. E.g., Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) P.g. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right no. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005) (it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit no. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

35. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and groundwater and the effect of pre-stream capture on surface water. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 7-8; *In the Matter of Beneficial Water Use Permit nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(mitigation of depletion required), *affirmed*, Faust v. DNRC et al., Cause no. CDV-2006-886, Montana First Judicial District (2008); see also Robert and Marlene Takle v. DNRC et al., Cause no. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for

Beneficial Water Use Permit nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and groundwater appropriators must prove unappropriated surface water, *citing* Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit no. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing* Loyning v. Rankin (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillon Electric Light and Power Co. (1906), 34 Mont. 135, 85 P. 880); *In the Matter of Beneficial Water Use Permit no. 63997-42M by Joseph F. Crisafulli* (DNRC Final Order 1990)(since there is a relationship between surface flows and the groundwater source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage.) Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration to limit its analysis to groundwater. § 85-2-311(a)(ii), MCA. Absent such proof, the applicant must analyze the legal availability of surface water in light of the proposed groundwater appropriation. *In the Matter of Application for Beneficial Water Use Permit no. 41H 30023457 by Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit no. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) P.g. 5; Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12.

Where a proposed groundwater appropriation depletes surface water, applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal

demands on and availability of water in the surface water source. Robert and Marlene Takle v. DNRC et al., Cause no. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit nos. 41H 30012025 And 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(permits granted), *affirmed*, Faust v. DNRC et al., Cause no. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007)(permit granted), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause no. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit no. 41H 30023457 by Utility Solutions LLC* (DNRC Final Order 2007) (permit denied for failure to analyze legal availability outside of irrigation season (where mitigation applied)); *In the Matter of Application for Beneficial Water Use Permit no. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit no. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water for depletion); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) P.g. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion of 3 gpm and 9 gpm respectively to slough and Beaverhead River); Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12 (“DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator”; applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping).

Applicant may use water right claims of potentially affected appropriators as a substitute for “historic beneficial use” in analyzing legal availability of surface water under § 85-2-360(5), MCA. Royston, *supra*.

36. The Department concludes the Applicant has proven by a preponderance of the evidence that ground water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested. (FOF 24-25)

37. Based on the Applicant's proposed mitigation plan, the Department concludes the Applicant has proven by a preponderance of the evidence that surface water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested. (FOF 36-31) § 85-2-311(1)(a)(ii), MCA.

### **Adverse Effect**

#### **FINDINGS OF FACT**

38. The Theis (1935) solution predicts 0.28 ft of drawdown to occur using a pumping schedule equal to the monthly net evaporation rate for a period of five years. No groundwater rights in the source aquifer are predicted to experience drawdown greater than one foot. (Groundwater Permit with Mitigation Report, Melissa Brickl, Groundwater Hydrologist, Water Sciences Bureau, p.g. 3).

39. As described in the Ground Water Permit with Mitigation Report, Big Sheep Creek is considered to be hydraulically connected to the source aquifer. Evaluations of the rate and timing of depletions caused by Proposed Permit no. 41A 30154952 are based on the basic concept that groundwater withdrawal eventually is offset by an equivalent increase in recharge or decrease in discharge (Theis, 1940; Leake et al., 2008), a process defined as capture by Lohman (1972). Depletion estimates were based on the withdrawal of the monthly consumed amounts. This simplifying assumption was made because the proposed place of use is located the same distance from the potentially affected surface water as the proposed point of diversion. All non-consumed water infiltrates the source aquifer and eventually returns to the potentially affected surface water (Groundwater Permit with Mitigation Report, Melissa Brickl, Groundwater Hydrologist, Water Sciences Bureau, p.g. 11). This finding is concurred with in the Hydrological Assessment Report Addendum submitted with the application by Pat Eller, P.G.

Table 4: Monthly consumed water, net depletions, proposed mitigation, and net effect to Big Sheep Creek (Groundwater Permit with Mitigation Report, Melissa Brickl, Groundwater Hydrologist, Water Sciences Bureau)

Month	Net Evaporation - Consumed Volume (AF)	Big Sheep Creek Net Depletion (AF)*	Big Sheep Creek Net Depletion (gpm)	Proposed Instream Mitigation (AF)**	Proposed Instream Mitigation (gpm)	Net Effect (gpm)
January	0	0	0	0	0	0
February	0	0	0	0	0	0
March	0	0	0	0	0	0
April	0.3	0.3	2.3	0.3	2.3	0.0
May	0.3	0.3	2.3	0.3	2.3	0.0
June	0.4	0.4	3.2	0.4	3.2	0.0
July	0.7	0.7	5.1	0.7	5.1	0.0
August	0.7	0.7	5.2	0.7	5.2	0.0
September	0.6	0.6	4.4	0.6	4.4	0.0
October	0.4	0.4	3.0	0.4	3.0	0.0
November	0	0	0	0	0	0
December	0	0	0	0	0	0
<b>Total</b>	<b>3.5</b>	<b>3.5</b>		<b>3.5</b>		

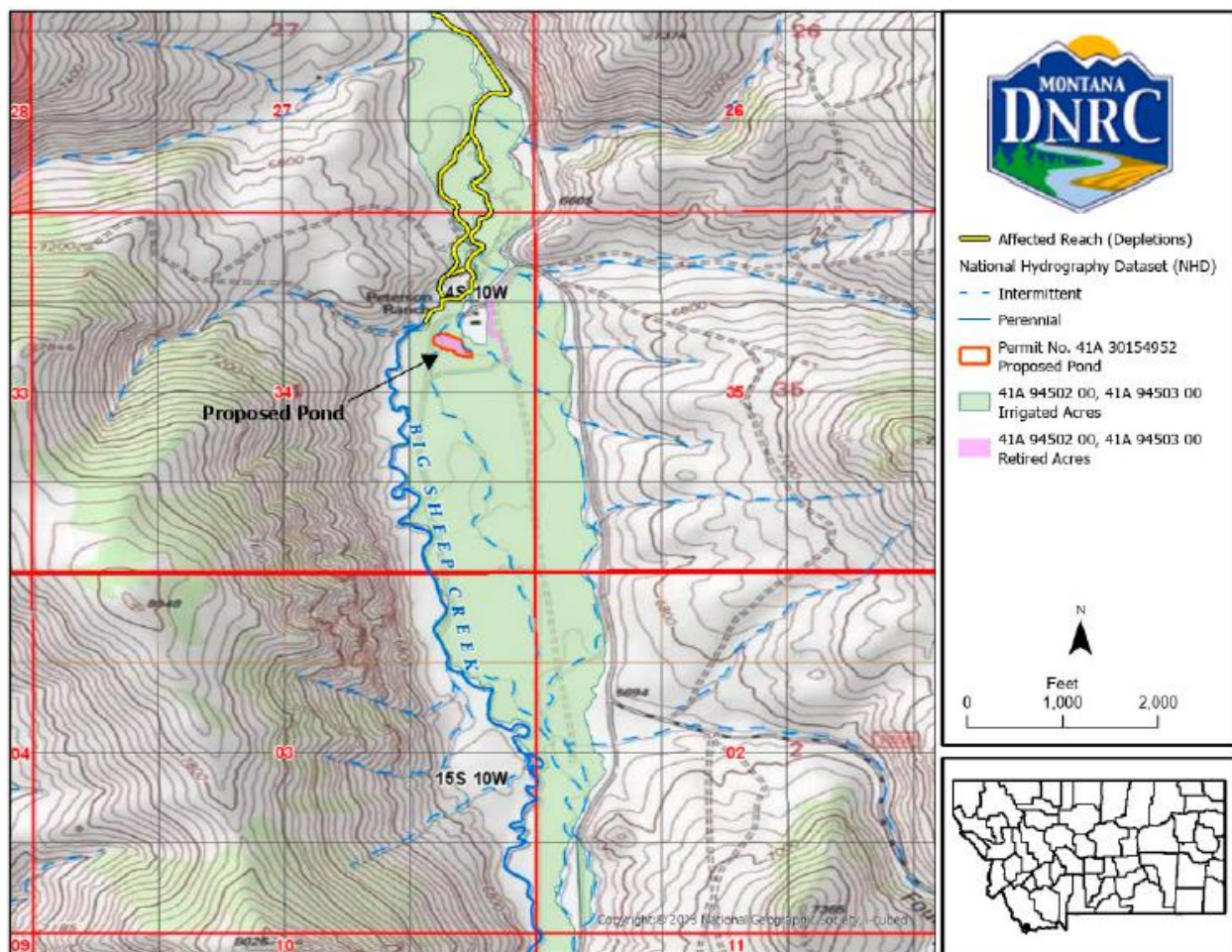
\* Modeled monthly depletions less than 0.1 AF were moved to the nearest months with depletions equal to or greater than 0.1 AF. As such, November-March months with depletions less than 0.1 AF became zero.

\*\* April and May mitigation volumes provided by retiring 108 animal units under Change Authorization 41A 30159796. June through October mitigation volumes provided by retiring 3.6 acres of historically irrigated land under Change Authorization 41A 30154953.

40. The Applicant's plan to prevent adverse effect to surface water rights is to mitigate the total consumptive volume associated with the groundwater pond. The mitigation plan is to retire 3.6 acres from the statement of claim nos. 41A 94502-00 and 41A 94503-00 over the months June through October (Change Application no. 41A 30154953). This proposed change will leave 2.9 AF in Big Sheep Creek over said time period (FOF 125-131), which will offset the modeled depletions from the proposed pond (see Table 3). The mitigation plan also includes retiring 108 Animal Units (AU) from statement of claim no. 41A 30113656 over the months April and May (Change Application no. 41A 30159796). Over that time period, this retirement will leave 0.6 AF of water in Big Sheep Creek for mitigation (FOF 132-134).

41. In total, the mitigation plan is proposing to leave water in Big Sheep Creek for the purpose of mitigation over the months April through October with a proposed total volume of 3.5 AF.

42. The location of the stream depletions on Big Sheep Creek have been identified in the Groundwater Permit with Mitigation Report, Melissa Brickl, Groundwater Hydrologist, Water Sciences Bureau as the “affected reach” (see Figure 4 below). These depletions are located on the reach downstream from the proposed POD and POU. Proposed Change Applications nos. 41A 30154953 and 41A 30159796 are to offset modeled depletions. The legal land description for this reach is in NW of Section 34 14S 10W.



43. The place of use for the mitigation of the Change Applications nos. 41A 30154953 and 41A 30159796 is Sections 2, 3, 11 15S 10W and Sections 34 14S 10W (FOF 125-134), which is located downstream from the original POD location to the start of the affected reach.
44. The Department finds the volume changed for mitigation in the Applicant's proposed plan is sufficient in volume, location, and time to mitigate surface depletions on Big Sheep Creek caused by proposed Permit 41A 30154952.
45. The Department finds that there will be no adverse effect to existing surface water rights. § 85-2-362 MCA

#### CONCLUSIONS OF LAW

46. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.
47. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit no. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(8).
48. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) P.g. 4.

49. It is the applicant's burden to produce the required evidence. E.g., Id. at P.g. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right no. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

50. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a *de minimis* level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) P.g. 8; see also, *In the Matter of Application for Beneficial Water Use Permit no. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009) (permit denied).

51. Simply asserting that an acknowledged reduction, however small, would not affect those with a prior right does not constitute the preponderance of the evidence necessary to sustain applicant's burden of proof. Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) P.g. 11 (Court rejected applicant's argument that net depletion of .15 millimeters in the level of the Bitterroot River could not be adverse effect.); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4 (Court rejected applicant's arguments that its net depletion (3 and 9 gpm, respectively to Black Slough and Beaverhead River) was "not an adverse effect because it's not measureable," and that the depletion "won't change how things are administered on the source."); *In the Matter of Beneficial Water Use Permit no. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006) (adverse effect not required to be measureable but must be calculable); see also Robert and Marlene Tackle v. DNRC et al., Cause no. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994).

After calculating the projected depletion for the irrigation season, the District Court in Sitz Ranch v. DNRC explained:

Section 85-2-363(3)(d) MCA requires analysis whether net depletion will adversely affect prior appropriators. Many appropriators are those who use surface water. Thus, surface water must be analyzed to determine if there is a net depletion to that resource. Sitz's own evidence demonstrates that about 8 acre-feet of water will be consumed each

irrigation season. Both Sitz and any other irrigator would claim harm if a third party were allowed to remove 8 acre-feet of water each season from the source upon which they rely.

Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4.

52. The Department can and routinely does, condition a new permit's use on use of that special management, technology or measurement such as augmentation now generally known as mitigation and aquifer recharge. See § 85-2-312; § 85-2-360 et seq., MCA; see, e.g., In the Matter of Beneficial Water Use Permit no. 107-411 by Diehl Development (DNRC Final Order 1974) (No adverse effect if permit conditions to allow specific flow past point of diversion.); *In the Matter of Combined Application for Beneficial Water Use Permit no. 76H- 30043133 and Application no. 76H-30043132 to Change Water Right nos. 76H-121640-00, 76H-131641-00 and 76H-131642-00 by the Town of Stevensville* (DNRC Final Order 2011).

53. The Department has a history of approving new appropriations where applicant will mitigate/augment to offset depletions caused by the new appropriation. E.g., In the Matter of Beneficial Water Use Permit Application nos. 41H 30012025 and 41H 30013629 by Utility Solutions, LLC, (DNRC Final Order 2006)(permit conditioned to mitigate/augment depletions to the Gallatin River by use of infiltration galleries in the amount of .55 cfs and 124 AF), *affirmed*, Faust v. DNRC et al., Cause no. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Beneficial Water Use Permit Application nos. 41H 30019215 by Utility Solutions, LLC*, (DNRC Final Order 2007)(permit conditioned to mitigate 6 gpm up to 9.73 AF of potential depletion to the Gallatin River), *affirmed*, Montana River Action Network v. DNRC, Cause no. CDV-2007-602, Montana First Judicial District Court, (2008); *In the Matter of Application for Beneficial Water Use Permit no. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008)(permit conditioned on mitigation of 3.2 gpm up to 5.18 AF of depletion to the Gallatin River); *In the Matter of Beneficial Water Use Permit Application no. 41I-104667 by Woods and Application to Change Water Right No 41I-G(W) 125497 by Ronald J. Woods*, (DNRC Final Order 2000); *In The Matter of Application To Change Appropriation Water Right 76GJ 110821*

by Peterson and MT Department of Transportation,( DNRC Final Order 2001); *In The Matter of Application To Change Appropriation Water Right no. 76G-3235699 by Arco Environmental Remediation LLC*.(DNRC Final Order 2003) (allows water under claim 76G-32356 to be exchanged for water appropriated out of priority by permits at the wet closures and wildlife to offset consumption). *In The Matter of Designation of the Larsen Creek Controlled Groundwater Area as Permanent, Board of Natural Resources Final Order* (1988).

Montana case law also provides a history of mitigation, including mitigation by new or untried methods. *See Thompson v. Harvey* (1974), 154 Mont. 133, 519 P.2d 963; *Perkins v. Kramer* (1966), 148 Mont. 355, 423 P.2d 587.

Augmentation/ mitigation is also recognized in other prior appropriation states for various purposes. E.g. C.R.S.A. § 37-92-302 (Colorado); A.R.S. § 45-561 (Arizona); RCWA 90.46.100 (Washington); ID ST § 42-1763B and § 42-4201A (Idaho).

# The requirement for mitigation in closed basins has been codified in § 85-2-360, *et seq.*, MCA. Section 85-2-360(5), MCA provides in relevant part:

A determination of whether or not there is an adverse effect on a prior appropriator as the result of a new appropriation right is a determination that must be made by the department based on the amount, location, and duration of the amount of net depletion that causes the adverse effect relative to the historic beneficial use of the appropriation right that may be adversely affected.

E.g., *Combined Application for Beneficial Water Use Permit no. 76G-30050801 and Change Authorization 76G-30050805 by Missoula County* (DNRC Final Order 2012)(permit granted conditioned on mitigation of depletion ranging .8 to 7.4 gpm); *In the Matter of Application no. 76H-30046211 for a Beneficial Water Use Permit and Application no.76H-30046210 to Change a Non-filed Water Right by Patricia Skergan and Jim Helmer* (DNRC Final Order 2010, Combined Application)(permit granted conditioned on mitigation).

54. If the applicant seeks to use a mitigation plan to prove lack of adverse effect, the applicant must have a defined mitigation proposal at the time of application. It is the Applicant's burden to come forward with proof at the time the Application is made. The Department cannot approve a permit on this basis of some unidentified proposal that it has no opportunity to evaluate as to

whether it successfully allows the Applicant to prove the criteria. Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) P.g. 10 (it was within the discretion of the Department to decline to consider an undeveloped mitigation proposal as mitigation for adverse effect in a permit proceeding); *In the Matter of Beneficial Water Use Permit nos. 41H 30012025 And 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006) (permits granted based on plan for mitigation of depletion), *affirmed*, Faust v. DNRC et al., Cause no. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007) (permit granted on basis of plan for mitigation of depletion), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause no. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit no. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); §85-2-360 *et seq.*, MCA.

55. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their “historic beneficial use.” See Matter of Application for Change of Appropriation Water Rights nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

56. The Department will evaluate whether an applicant’s proposed plan, i.e. mitigation or aquifer recharge, will offset depletions so as to meet § 85-2-311(1)(b), MCA, in the permit proceeding. The applicant’s authority to use the water as proposed is assumed for the purposes of the analysis. The authority of the applicant to use the offset water as proposed for the plan is not determined in the permit proceeding but is determined in any required application for change in appropriation. Whether the applicant proves by a preponderance of the evidence that the mitigation/aquifer recharge plan will be effective is determined in the permit proceeding. Thus, the applicant must accurately convey to the Department exactly what it proposes for a mitigation/aquifer recharge plan. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) P.g. 10 (it was within the discretion of the Department to decline to consider an undeveloped mitigation proposal as

mitigation for adverse effect in a permit proceeding); *In the Matter of Beneficial Water Use Permit nos. 41H 30012025 And 41H 30013629 By Utility Solutions LLC* (DNRC Final Order 2006), *affirmed*, Faust v. DNRC et al., Cause no. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007) , *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause no. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit no. 41H 30026244 by Utility Solutions LLC* (DNRC Final Order 2008); § 85-2-360 *et seq.*

57. Pursuant to § 85-2-363, MCA, an applicant whose hydrogeologic assessment conducted pursuant to § 85-2-361, MCA, predicts that there will be a net depletion of surface water shall offset the net depletion that results in the adverse effect through a mitigation plan or an aquifer recharge plan.

58. Pursuant to § 85-2-362, MCA, a mitigation plan must include: where and how the water in the plan will be put to beneficial use; when and where, generally, water reallocated through exchange or substitution will be required; the amount of water reallocated through exchange or substitution that is required; how the proposed project or beneficial use for which the mitigation plan is required will be operated; evidence that an application for a change in appropriation right, if necessary, has been submitted; evidence of water availability; and evidence of how the mitigation plan will offset the required amount of net depletion of surface water in a manner that will offset an adverse effect on a prior appropriator.

59. In this case Applicant proposes to mitigate its full consumptive use under the proposed appropriation. This mitigation provides mitigation of full depletion of surface waters by the proposed appropriation in amount, location, and duration of the depletion. Because Applicant proposes to mitigate the full amount of its consumptive use, there is no adverse effect from depletion of surface waters to the historic beneficial use of surface water rights. E.g., In the Matter of Application for Beneficial Water Use Permit no. 41H 30026244 by Utility Solutions LLC (DNRC Final Order 2008).

60. The Department concludes the Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected by the proposed appropriation. § 85-2-311(d), MCA. (FOF 38-45).

### **Adequate Diversion**

#### **FINDINGS OF FACT**

61. The proposed means of diversion is a 16.5-foot-deep pit pond designed to let groundwater flow into the pond at W2SENE of Section 34, R14S, R10W. Pond outflows will be controlled by a buried Agridrain structure to keep the pond at the designated level. The pond is designed to intercept the water table and will not have a means of inflow control. For this aquifer, the DNRC estimated a transmissivity of 7,480.5 gallons per day per foot (Groundwater Permit with Mitigation Report by Melissa Brickl, Groundwater Hydrologist, Water Sciences Bureau, p.g. 5), which will allow for the movement of enough water to meet the needs of the beneficial use; given the above stated design.

62. The location of the point of diversion is identical to the location of the place of use. As such there is no conveyance infrastructure.

63. The Department finds that the proposed groundwater pit pond is an adequate means of diversion for the proposed beneficial use.

#### **CONCLUSIONS OF LAW**

64. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate. The adequate means of diversion statutory test merely codifies and encapsulates the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit no. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

65. Information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies, based upon project complexity design by licensed engineer adequate. *In the Matter of Application for Beneficial Water Use Permit no. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002).
66. The Department concludes the Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA. (FOF 61-63)

### **Beneficial Use**

#### **FINDINGS OF FACT**

67. The volume requested for this right is equal to the amount of consumptive use (equal to the net evaporative losses or 3.5 AF) plus the capacity of the pond (calculated to be 15.7 AF) for a total volume of 19.2 AF (FOF 14).
68. The application will be subject to the following conditions, limitations, or restrictions:  
FISH WILDLIFE AND PARKS FISH POND LICENSE REQUIREMENT: THE APPROPRIATOR SHALL ENSURE THAT THE POND IS PLANTED WITH LEGALLY OBTAINED FISH AND THAT A PRIVATE FISH POND LICENSE IS OBTAINED AND SUBMITTED AT PROJECT COMPETITION, AFTER WHICH THIS CONDITION WILL BE REMOVED.
69. Per 1981 Trout Farming in Washington EB756 page 9, a typical pond can support 100-200 eating size trout per acre of surface water. The proposed pond with a surface area of 1.8 acres is therefore capable of supporting roughly 180-360 adult trout. Additionally, 1981 Trout Farming in Washington EB756, it appears that the proposed pond is sufficient in its depth and design to support a fishery.
70. The Department finds that the Applicant has shown a beneficial use for the proposed Permit as conditioned.

#### **CONCLUSIONS OF LAW**

71. Under § 85-2-311(1)(d), MCA, an applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. See also, §§ 85-2-301 and 402(2)(c), MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, *supra*; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396.

72. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause no. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit no. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause no. BDV-2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit no. 41S-105823 by French* (DNRC Final Order 2000).

73. Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) P.g. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

74. Applicant proposes to use water for Fishery which is a recognized beneficial use. § 85-2-102(5), MCA. The Department concludes the Applicant has proven by a preponderance of the evidence Fishery is a beneficial use and that the 19.16 AF of diverted volume of water requested is the amount needed to sustain the beneficial use. (FOF 67-70)

### **Possessory Interest**

#### **FINDINGS OF FACT**

75. The Applicant signed the affidavit on the application affirming that they have possessory interest, or the written consent of the person with the possessory interest, in the property where

the water is to be put to beneficial use. This is corroborated by The State of Montana Ownership Records.

76. The Department finds that the Applicant has shown possessory interest in the property where the water is to be put to beneficial use.

### CONCLUSIONS OF LAW

77. Pursuant to § 85-2-311(1)(e), MCA, an applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

78. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

79. The Department concludes the Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest,

in the property where the water is to be put to beneficial use. § 85-2-402(2)(d), MCA. (FOF 75-76)

**CHANGE NO. 41A 30154953**  
**WATER RIGHTS TO BE CHANGED**

**FINDINGS OF FACT**

80. The Applicant proposes to change a portion of statement of claim nos. 41A 94502-00 and 41A 94503-00 from their historical use of irrigation to the purpose of mitigation. Both claims have historically diverted surface water out of Big Sheep Creek for the flood irrigation of 340.4 acres. The flow rate for 41A 94502-00 is 3.0 CFS and 41A 94503-00 is 4.0 CFS. The Water Court accepted a motion to amend, correcting the POD for both water rights from SWNENE of Section 34 14S 10W, NESENE of Section 34 14S 10W, and NWSWNW of Section 11 15S 10W to NWSENE of Section 34 14S 10W and NWSWNW of Section 11 15S 10W. Currently, the DNRC database lists these updated points of diversion as NWSENE of Section 34 14S 10W and NWSWNW of Section 11 15S 10W for both claims 41A 94502-00 and 41A 94503-00. The priority date on both claims is October 14, 1886 and the claimed period of diversion for both claims is June 1<sup>st</sup> through October 15<sup>th</sup>.

Table 5: statements of claim Proposed for Change

W.R. no.	Flow	Purpose	Period of use	Acres	Place of Use	Point(s) of Diversion	Priority Date	Source
<b>41A 94502-00</b>	3.0 CFS/1346.4 GPM	Irrigation	06/01-10/15	390*	NESE, SESE Sec. 27, T14S R10W NENE, SENE, NESE, SESE Sec. 34, T14S, R10W SWNW, NWSW, SWSW Sec. 35, T14S, R10W NWNW, SWNW, NWSW, SWSW Sec. 2, T15S, R10W NENE, SENE Sec. 3, T15S, R10W NWNW Sec. 11, T15S, R10W	NWSENE, Sec. 34, T14S, R10W NWSWNW Sec. 11, T15S, R10W	10/14/1886	Big Sheep Creek

<b>41A 94503-00</b>	4.0 CFS/1795.2 GPM	Irrigation	06/01- 10/15	390*	NESE, SESE Sec. 27, T14S R10W NENE, SENE, NESE, SESE Sec. 34, T14S, R10W SWNW, NWSW, SWSW Sec. 35, T14S, R10W NWNW, SWNW, NWSW, SWSW Sec. 2, T15S, R10W NENE, SENE Sec. 3, T15S, R10W NWNW Sec. 11, T15S, R10W	NWSENE, Sec. 34, T14S, R10W NWSWNW Sec. 11, T15S, R10W	10/14/1886	Big Sheep Creek
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\* claim nos. 41A 94502-00 and 41A 94503-00 were preliminary decreed with a POU of 390.0 acres on May 9, 2013. A Masters Report issued 6/28/2017 and amended and adopted 7/25/2017 (Case no. 41A-164) also confirmed 390.0 acres. The Applicant asserts that 390-acres was an overestimation of acres irrigated and utilizes a POU of 340.4-acres in accordance with historic use and imagery submitted with this application.

81. Table 5 has been updated to reflect the claims as they currently exist in the database. On the original tech report, Tables 1 and 2 listed the PODs as they were claimed prior to the amendment being accepted by the Water Court.

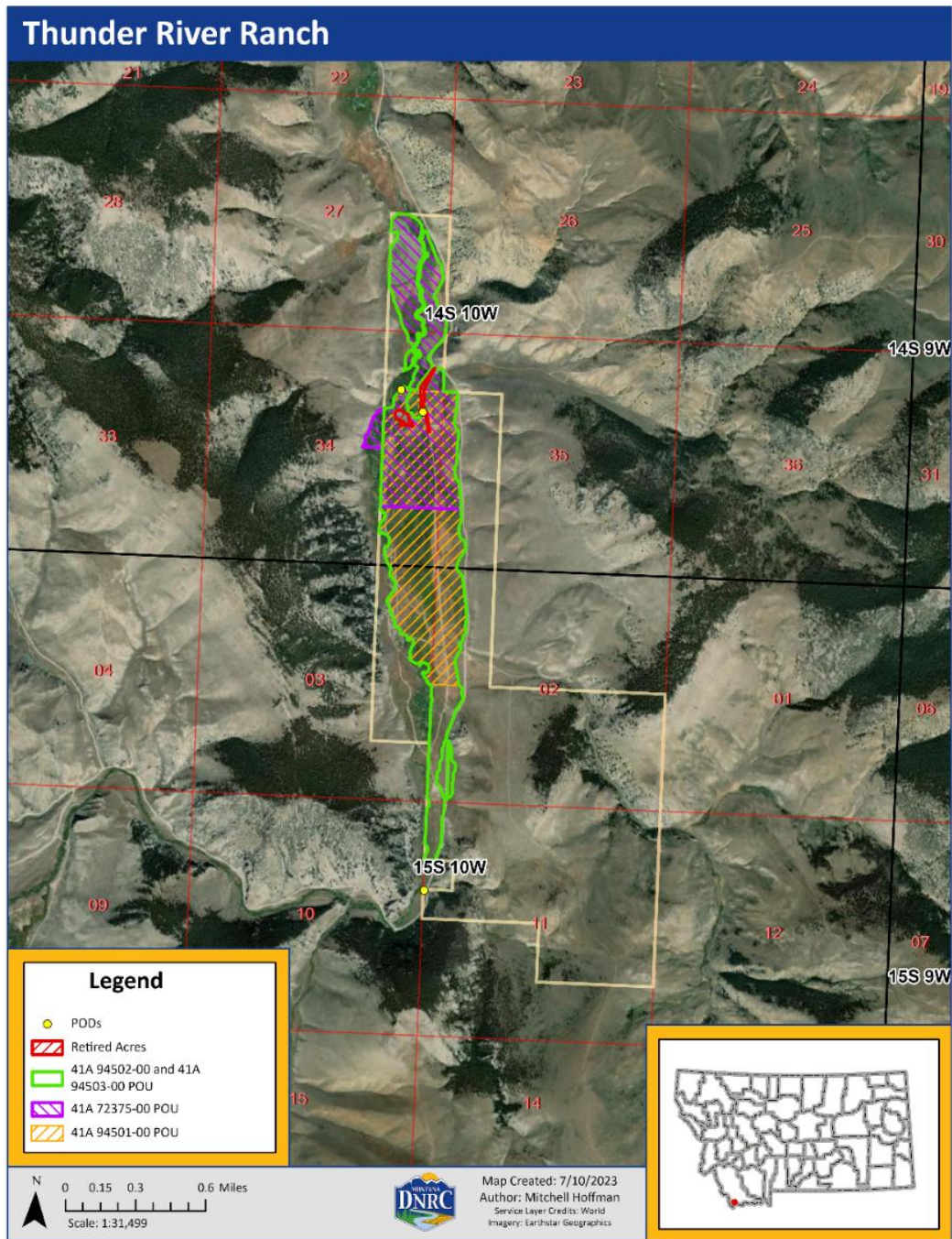


Figure 5: Map of Supplemental Rights

Preliminary Determination to Grant  
 Combined Application nos. 41A 30154952, 41A 30154953 & 41A 30159796.

### **CHANGE PROPOSAL 41A 30154953**

#### **FINDINGS OF FACT**

82. This change Application proposes to change statement of claim nos. 41A 94502-00 and 41A 94503-00. The Applicant proposes to retire 3.6 acres of irrigation from E2NE of Section 34 14S 10W and leave the water in Big Sheep Creek for the purpose of mitigation in order to offset stream depletions from proposed Permit no. 41A 30154952. This mitigation will be equivalent to the historic consumed volume and irrecoverable losses associated with the retired acres and will have a volume of 2.9 AF. (FOF 125-131)

83. The place of use for the proposed mitigation is from the claimed point of diversion to the start of the affected reach as identified in The Groundwater Permit with Mitigation Report, Melissa Brickl, Groundwater Hydrologist, Water Sciences Bureau, p.g. 11, which is in Sections 2, 3, 11 15S 10W and Section 34 14S 10W.

84. The remaining 336.8 acres of irrigation identified in the historic use analysis will continue to be used as it was historically.

### **CHANGE NO. 41A 30159796**

#### **WATER RIGHT TO BE CHANGED**

#### **FINDINGS OF FACT**

85. The Applicant proposes to change a portion of statement of claim no. 41A 30113656 from its historical use of stock drinking directly from Big Sheep Creek to the purpose of mitigation. Per 2006 Supreme Court Examination Rule 24(b and c), water rights for stock drinking directly from a source will not be decreed a quantified flow rate or volume. This water right has historically been for 500 AU drinking directly from the source in Sections 27 and 34, 14S 10W and Sections 2, 3, and 11, 15S 10W. The period of diversion/use for this water right is year-round, and the water was first put to beneficial use on October 14<sup>th</sup>, 1886 (per Case no. 3808 Beaverhead Co).

86. The place of use does not contain any other surface water rights used for stock. There is no overlapping use.

87. The Department Technical Report dated 8/4/2023 had a typo on page 1: “The pond would be authorized under Water Right Application no. 41A 30159796.” This is incorrect and should have stated that the pond would be authorized under Permit Application no. 41A 30154952.

## **CHANGE PROPOSAL 41A 30159796**

### **FINDINGS OF FACT**

88. The Applicant proposes to retire 108 AU during the months of April and May. Per the Water Court decreed volume of 30 GPD/AU, 108 AU drinking directly from source would calculate to be 0.6 AF of water which will be left in Big Sheep Creek during April and May for the purpose of mitigation to offset stream depletions from proposed Permit no. 41A 30154952. The place of use for the proposed mitigation is Section 2, 3, 11 15S 10W and Section 34 14S 10W or the reach from the original point of diversion to the start of the affected reach as identified in The Groundwater Permit with Mitigation Report, Melissa Brickl, Groundwater Hydrologist, Water Sciences Bureau, p.g. 11. The portion of water for the remaining 392 AU, and the water use outside of the months March-June will remain unchanged.

## **§ 85-2-402, MCA, CHANGE CRITERIA**

### **GENERAL CONCLUSIONS OF LAW**

89. An applicant in a change proceeding must affirmatively prove all of the criteria in § 85-2-402, MCA. Under this Preliminary Determination, the relevant change criteria in § 85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), and (16) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), the proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

(d) Except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to [85-2-436](#) or a temporary change in appropriation right authorization pursuant to [85-2-408](#) or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to [85-2-320](#), the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

(e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will salvage at least the amount of water asserted by the applicant.

The Department has jurisdiction to approve a change if the appropriator proves the applicable criteria in § 85-2-402, MCA. The requirements of Montana's change statute have been litigated and upheld in Matter of Application for Change of Appropriation Water Rights nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054, and the applicant has the burden of proof at all stages before the Department and courts. Hohenlohe v. DNRC, 2010 MT 203, ¶ 75; Town of Manhattan v. DNRC, Cause no. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) P.g. 8, *aff'd on other grounds*, Town of Manhattan v. DNRC, 2012 MT 81.

# The burden of proof in a change proceeding is by a preponderance of evidence, which is "more probably than not." Hohenlohe ¶¶ 33, 35.

90. In a change proceeding and in accordance with well-settled western water law, other appropriators have a vested right to have the stream conditions maintained substantially as they

existed at the time of their appropriations. Spokane Ranch and Water Co. v. Beatty (1908), 37 Mont. 342, 96 P. 727; ); McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598 (existing water right is the pattern of historic use; beneficial use is the basis measure and the limit); Robert E. Beck, 2 Waters and Water Rights § 14.04(c)(1) (1991 edition); W. Hutchins, Selected Problems in the Law of Water Rights in the West 378 (1942); *In the Matter of Application to Change Appropriation Water Right no.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991)(senior appropriator cannot change pattern of use to detriment of junior); see also Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo.,2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation). This right to protect stream conditions substantially as they existed at the time of appropriations was recognized in the Water Use Act in § 85-2-401, MCA. An applicant must prove that all other appropriators can continue to reasonably exercise their water rights under changes in the stream conditions attributable to the proposed change; otherwise, the change cannot be approved. Montana’s change statute reads in part to this issue:

85-2-402. (2) ... the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) *The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons* or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

....

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section

(italics added).

91. Montana's change statute simply codifies western water law.<sup>1</sup> One commentator describes the general requirements in change proceedings as follows:

Perhaps the most common issue in a reallocation [change] dispute is whether other appropriators will be injured because of an increase in the consumptive use of water. Consumptive use has been defined as "diversions less returns, the difference being the amount of water physically removed (depleted) from the stream through evapotranspiration by irrigated crops or consumed by industrial processes, manufacturing, power generation or municipal use." "Irrigation consumptive use is the amount of consumptive use supplied by irrigation water applied in addition to the natural precipitation which is effectively available to the plant."

An appropriator may not increase, through reallocation [change] or otherwise, the actual historic consumptive use of water to the injury of other appropriators. In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use. As a limitation on the right of reallocation, historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriation.

Historic consumptive use varies greatly with the circumstances of use.

Robert E. Beck, 2 Water and Water Rights at § 14.04(c)(1)(b), pp. 14-50, 51 (1991 edition) .

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District (Colo. 1986), 717 P.2d 955, 959, the court held:

[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which

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<sup>1</sup> Although Montana has not codified the law in the detail, Wyoming has, and the two states' requirements are virtually the same. Wyo. Stat. § 41-3-104 states:

When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change .... The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.

Colorado follows a similar analysis under its requirement that a "change of water right, ... shall be approved if such change, ... will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right." §37-92-305(3)(a), C.R.S. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002).

had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.

See also 1 Wells A. Hutchins, Water Rights and Laws in the Nineteen Western States (1971), at p. 624 (changes in exercise of appropriative rights do not contemplate or countenance any increase in the quantity of water diverted under the original exercise of the right; in no event would an increase in the appropriated water supply be authorized by virtue of a change in point of diversion, place of use, or purpose of use of water); A. Dan Tarlock, Law of Water Rights and Water Resources (2007), at § 5:78 (“A water holder can only transfer the amount that he has historically put to beneficial use.... A water holder may only transfer the amount of water consumed. The increment diverted but not consumed must be left in the stream to protect junior appropriators. Consumption is a function of the evapotranspiration of the appropriator’s crops. Carriage losses are usually added to the amount consumed by the crops.”); § 37-92-301(5), C.R.S. (in proceedings for a reallocation [change], it is appropriate to consider abandonment of the water right); Wyo. Stat. Ann. § 41-3-104.

Accordingly, the DNRC in administrative rulings has held that a water right in a change proceeding is defined by actual beneficial use, not the amount claimed or even decreed. *E.g., In the Matter of Application for Change Authorization no. G(W)028708-41I by Hedrich/Straugh/Ringer*, (DNRC Final Order 1991); *In the Matter of Application for Change Authorization no. G(W)008323-g76L by Starkel/Koester*, (DNRC Final Order 1992); *In The Matter of Application for Beneficial Water User Permit No 20736-S41H by the City of Bozeman and In the Matter of the Application to Sever or Sell Appropriation Water Right 20737-S41H*, Proposal for Decision and Memorandum at Pgs. 8-22 (Adopted by Final Order January 9, 1985); see McDonald, *supra* (beneficial use is the measure, limit and basis, irrespective of greater quantity attempted to be appropriated); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (amount of water right is actual historic use); Town of Manhattan v. DNRC, Cause no. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) Pgs. 11-12 (proof of historic use is required even when the right has been decreed because the

decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use, *citing McDonald*).

# The Montana Supreme Court recently explained:

An appropriator historically has been entitled to the greatest quantity of water he can put to use. [Sayre v. Johnson, 33 Mont. 15, 18, 81 P. 389, 390 \(1905\)](#). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. [In re Adjudication of Existing Rights to the Use of All Water, 2002 MT 216, ¶ 56, 311 Mont. 327, 55 P.3d 396](#); see also [§ 85-2-311\(1\)\(d\), MCA](#). This limitation springs from a fundamental tenet of western water law - that an appropriator has a right only to that amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights. [Spokane Ranch and Water Co. v. Beatty, 37 Mont. 342, 351, 96 P. 727, 731 \(1908\)](#)....

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

[Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 43, 45](#); see also [Town of Manhattan v. DNRC, Cause no. DV-09-872C, Montana Eighteenth Judicial District Court, Order Re Petition for Judicial Review, \(2011\) P.g. 9.](#)

92. The extent of the historic beneficial use must be determined in a change case. [E.g., McDonald; Hohenlohe ¶ 43; Quigley; Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 \(Colo. 2002\); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 \(Colo.,1999\); City of Bozeman \(DNRC\), supra \(“the doctrine of historic use gives effect to the implied limitations read into every decreed right that an appropriator has no right to waste water or to otherwise expand his appropriation to the detriment of juniors”\)](#). As a point of clarification, a claim filed for an existing water right in accordance with Mont. Code Ann. § 85-2-221 constitutes *prima facie* proof of the claim only for the purposes of the

adjudication pursuant to Title 85, Chapter 2, Part 2. The claim does not constitute *prima facie* evidence of historical use for the purposes of a change in appropriation proceeding before the Department under § 85-2-402, MCA. Importantly, irrigation water right claims are also not decreed with a volume and are, thus, limited by the Water Court to their “historic beneficial use.” § 85-2-234, MCA. Town of Manhattan v. DNRC, Cause no. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) P.g. 11 (proof of historic use is required even where a water right is decreed).

93. The Department is within its authority to put a volume on a change authorization even where there is no volume on the statement of claim. The placement of a volume on the change authorization is not an “adjudication” of the water right. Hohenlohe ¶¶ 30-31.

94. Consumptive use of water may not increase when an existing water right is changed. Town of Manhattan v. DNRC, Cause no. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) P.g. 9; *In the Matter of Application to Change a Water Right no. 40M 30005660 By Harry Taylor II and Jacqueline R. Taylor*, (DNRC Final Order 2005); *In The Matter of Application to Change a Water Right no. 40A 30005100 by Berg Ranch Co./Richard Berg*, DNRC Proposal For Decision (2005) (Final Order adopted findings of fact and conclusions of law in proposal for decision); *In the Matter of Application to Change a Water Right no. 41I 30002512 by Brewer Land Co, LLC*, DNRC Proposal For Decision (2003) (Final Order adopted findings of fact and conclusions of law in proposal for decision); see also Quigley. An increase in consumptive use constitutes a new appropriation. Town of Manhattan v. DNRC, Cause no. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review* (2011) P.g. 9 (citing Featherman v. Hennessy, (1911) 43 Mont. 310, 316-17).

In a change proceeding, the *consumptive* use of the historical right has to be determined:

In a reallocation [change] proceeding, both the actual historic consumptive use and the expected consumptive use resulting from the reallocation [change] are estimated. Engineers usually make these estimates.

With respect to a reallocation [change], the engineer conducts an investigation to determine the historic diversions and the historic consumptive use of the water subject to reallocation [change]. This investigation involves an examination of historic use over a period that may range from 10 years to several decades, depending on the value of the water right being reallocated [changed].

....

When reallocating [changing] an irrigation water right, the quantity and timing of historic consumptive use must be determined in light of the crops that were irrigated, the relative priority of the right, and the amount of natural rainfall available to and consumed by the growing crop.

....

Expected consumptive use after a reallocation [change] may not exceed historic *consumptive* use if, as would typically be the case, other appropriators would be harmed. Accordingly, if an increase in consumptive use is expected, the quantity or flow of reallocated [changed] water is decreased so that actual historic consumptive use is not increased.

2 Water and Water Rights at § 14.04(c)(1); see also, Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo,1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.). The Department can request consumptive use information from an applicant. Hohenlohe ¶¶ 51, 68-69.

95. Denial of a change in appropriation in whole or part does not affect the exercise of the underlying right(s). The water right holder can continue to exercise the underlying right, unchanged as it has historically. The Department's change process only addresses the water right holder's ability to make a different use of that existing right. E.g., Town of Manhattan v. DNRC, Cause no. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) P.g. 8; *In the Matter of Application to Change Appropriation Water Right no.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

96. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge. ARM 36.12.221(4).

**Historic Use Change No. 41A 30154953:**

**FINDINGS OF FACT**

97. As per ARM 36.12.1902(1)(a), historic information for a statement of claim must be described as it was used prior to July 1, 1973, unless the statement of claim was subject to a previous change in which case it is the date of completion of the change. statement of claim nos. 41A 94502-00 and 41A 94503-00 have not had a post July 1<sup>st</sup>, 1973, change and as such historic use for these claims will be assessed prior to July 1<sup>st</sup>, 1973.

98. Statement of claim nos. 41A 94502-00 and 41A 94503-00 have a priority date of October 14<sup>th</sup>, 1886, and were included in the preliminary decree dated May 9<sup>th</sup>, 2013. claims 41A 94502-00 and 41A 94503-00 have decreed flow rates of 120 Minors Inches (MI), and 160 MI (3 CFS and 4 CFS) respectively, per Beaverhead County District Court case no. 3808. These supplemental rights have historically flood irrigated 340.4 acres of land south of Dillion, along Big Sheep Creek.

**Points of Diversion, Flow Rate and Conveyance Facilities**

99. Historically, water for statement of claim nos. 41A 94502-00 and 41A 94503-00 was diverted out of Big Sheep Creek at two PODs, NWSENE of Section 34 14S 10W and NWSWNW of Section 11 15S 10W. Water has historically been conveyed from POD 1 through the West Irrigation Ditch 1,600 ft to the POU. The West Ditch is not utilized by any other water rights. The second POD (listed as POD 3 on the abstract) originally diverted water into the East irrigation ditch where it was conveyed 700 ft to the POU. The East Ditch is used by one additional water right, 41A 94509-00, which has the purpose of stock drinking directly from the ditch. The period of use for this water right is October 1<sup>st</sup> through May 1<sup>st</sup>. Because the West Ditch has no other user, and the East Ditch is shared only with stock, the DNRC Technical Memorandum: Distributing Conveyance Loss on Multiple User Ditches dated 2/14/2020 does not apply.

100. Conveyance losses were originally not calculated for the West Ditch in the technical report. It was considered to run along the place of use, and therefore left out of the calculations per ARM 36.12.1902(10)(a). However, the Applicant asserts the ditch runs for 1,600 ft before the POU and should've had a conveyance loss calculated, this is supported by aerial photographs (rbecxm10b046, rbecxm10b107, CXM-5P-9, CXM-5P-10, and 40 30001 579-167). Therefore, the Department will include those calculations in this document. See FOF 99-103

101. A motion to amend the points of diversion was submitted by the claimant on August 4<sup>th</sup>, 2022. The Water Court accepted this motion and updated the POD legal land description on August 25<sup>th</sup>, 2022 (detailed earlier in this document). claim nos. 41A 94502-00 and 41A 94503-00 share two ditches, here labeled as “East Ditch” and “West Ditch”. The conveyance loss calculations are listed in Tables 6 and 7.

102. ARM 36.12.1902 was used to assess the conveyance loss for both ditches. The formulas and figures used are listed below.

Table 6: Conveyance Loss for East Ditch

Seasonal Conveyance Loss = Seepage Loss + Vegetation Loss + Ditch Evaporation		
Seepage Loss =	(wetted perimeter)(ditch length)(loss rate)(days)/43,560 ft <sup>2</sup> /acre	
wetted perimeter =	9.5 ft.	(Applicant Provided)
ditch length =	700.0 feet	(GIS Measurement)
loss rate =	0.8 ft <sup>3</sup> /ft <sup>2</sup> /day	(Applicant Provided)
days irrigated =	137	(Abstract, Deficiency Response)
Seepage Loss =	(9.5 ft.)(700.0 ft.)(0.8 ft <sup>3</sup> /ft <sup>2</sup> /day)(137 days) /43560 ft <sup>2</sup>	<b>16.73 acre-feet</b>
Vegetation Loss =	(% loss/mile)(flow)(days)(ditch length)(2 ft/ft <sup>3</sup> /s/d)-unit conversion constant	
% loss/mile =	0.0075	(NEH standard, 1993)
est. flow rate =	<b>6.2 ft<sup>3</sup>/s</b>	(Validated by Supporting Documentation)
days irrigated =	137	(Abstract, Deficiency Response)
ditch length =	0.13 miles	(GIS Measurement)
Vegetation Loss =	(0.0075)(7.0 ft <sup>3</sup> /s)(0.13 mi)(137 days)(2 ft./ft <sup>3</sup> /s/d) =	<b>1.66 acre-feet</b>
Ditch Evaporation =	(8.76 ft. x 700.0ft)(3.46 Lima Station)/43,560 ft <sup>2</sup> /ac = <b>0.49 acre-feet</b>	
Seasonal Conveyance Loss =	(16.73 acre-feet) + (1.66 acre-feet) + (0.49 acre-feet) = <b>18.89 acre-feet</b>	

Table 7: Conveyance Loss for West Ditch

Seasonal Conveyance Loss = Seepage Loss + Vegetation Loss + Ditch Evaporation		
Seepage Loss =	(wetted perimeter)(ditch length)(loss rate)(days)/43,560 ft <sup>2</sup> /acre	
wetted perimeter =	5.4 ft.	(Applicant Provided)
ditch length =	1600 feet	(Applicant Provided/GIS measured)
loss rate =	0.8 ft <sup>3</sup> /ft <sup>2</sup> /day	(Applicant Provided)
days irrigated =	137	(Abstract, Deficiency Response)
Seepage Loss =	(5.4 ft.)(1600 ft.)(0.8 ft <sup>3</sup> /ft <sup>2</sup> /day)(137 days) /43560 ft <sup>2</sup>	<b>21.74 acre-feet</b>
Vegetation Loss =	(% loss/mile)(flow)(days)(ditch length)(2 ft/ft <sup>3</sup> /s/d)-unit conversion constant	
% loss/mile =	0.0075	(NEH standard, 1993)
est. flow rate =	<b>0.8 ft<sup>3</sup>/s</b>	(Validated by Supporting Documentation)
days irrigated =	137	(Abstract, Deficiency Response)
ditch length =	0.30 miles	(Applicant Provided/GIS measured)
Vegetation Loss =	(0.0075)(0.8 ft <sup>3</sup> /s)(0.30 mi)(137 days)(2 ft./ft <sup>3</sup> /s/d) =	<b>0.25 acre-feet</b>
Ditch Evaporation =	(5.0 ft. x 1600 ft)(3.46 Lima Station)/43,560 ft <sup>2</sup> /ac = <b>0.64 acre-feet</b>	
<b>Seasonal Conveyance Loss =</b>	(21.74 acre-feet) + (0.25 acre-feet) + (0.64 acre-feet) = <b>22.62 acre-feet</b>	

103. The total conveyance loss for both ditches is 18.9 AF + 22.6 AF = 41.5 AF.

#### Period of Diversion/Use

104. The claimed period of diversion and period of use for statement claim nos. 41A 94502-00 and 41A 94503-00 is June 1<sup>st</sup> through October 15<sup>th</sup> of each year. There is no recorded history of a call on either claim.

#### Place of use

105. The place of use for statement of claim nos. 41A 94502-00 and 41A 94503-00 is in Sections 27, 34, and 35, 14S, 10W, and Sections 2, 3, and 11, 15S, 10W, in Beaverhead County.

106. The Applicant asserts that the claimed 390 acres irrigated was over claimed and asserts that statement of claim nos. 41A 94502-00 and 41A 94503-00 have historically irrigated 340.4 acres. The DNRC finds this a reasonable figure based on arials identified in FOF 100, Applicant submitted photographs, and other collected information.

107. The 1942, 1955, and 1979 aerial photographs (the Water Resource Survey Book for Beaverhead County was not published) corroborate the Applicant's statements on pre-July 1st, 1973 use (rbecxm10b046, rbecxm10b107, CXM-5P-9, CXM-5P-10, and 40 30001 579-167).

108. The statement of claim nos. 41A 94502-00 and 41A 94503-00 share a place of use with provisional Permit no. 41A 72375-00 and claim no. 41A 94501-00. The irrigation of the 117.5 acres under 41A 72375-00 did not occur until June 21, 1989, and will not be considered for supplemental historic use calculations. claim 41A 94501-00 supplements 230-acres of the 340.4-acre POU of claim nos. 41A 94502-00 and 41A 94503-00 with water from Four Eyes Creek. The Applicant states that Four Eyes Creek is intermittent and varies from year to year, some years with no water provided at all from Four Eyes Creek. Any water that does reach the ditch where it is mixed with water from Big Sheep Creek is minor, therefore for the purposes of this change, all historic use is attributed to Big Sheep Creek.

#### Diverted Volume and Consumptive Volume

109. Volumes for this Application were calculated using the standard procedures laid out in ARM 36.12.1902. The weather station used for calculating historic consumptive use is the Lima station in Beaverhead County, which is the closest station to the place of use identified. Estimated on-farm efficiency for a contour ditch irrigation system with a slope of 1.5 - 3% grade is 55%, referring to the percentage of the water delivered to the field that is used by the crop. The Beaverhead County Management factor for flood irrigation from 1964 to 1973 is 63.7%. A 5% irrecoverable loss (IL) rate was used for the historical flood irrigation. The IWR data for the annual irrigation water requirement at the place of use is approximately 13.75 inches. Therefore, the historical crop consumptive use for both water rights is 248.5 acre-feet and the total historic

consumptive volume for the 340.4 irrigated acres including irrecoverable losses is 271.1 AF, which when split proportionally is 116.2 AF for claim no. 41I 94502-00 and 154.9 AF for claim no. 41I 94503-00.

Table 8: Historic consumptive volume for claim nos. 41A 94502-00 and 41A 94503-00

<b>Consumptive Volume (HCV) Flood</b>	Beaverhead Co. Lima Station Flood, Wheeline & Handline Irrigation Water Requirements (inches)	Management Factor (Percent)	Acres	CV Acre-Feet (AF)	On-farm Efficiency	Field Application AF	Historic Irrecoverable Losses (IL) Flood 5%:	<b>Total HCV AF for the POU (Including IL)</b>	<b>Proportional HCV AF (including IL)*</b>
41A 94502	13.75	63.70%	340.4	248.5	55%	451.8	22.59	<b>271.1</b>	116.2
41A 94503	13.75	63.70%	340.4	248.5	55%	451.8	22.59	<b>271.1</b>	154.9

\*Consumed volumes were divided between claim nos. 41A 94502-00 and 41A 94503-00 proportionally based on decreed flow rate.

### Total Historic Use

110. The total diverted volume is the field application, 451.8, plus the total conveyance loss, 41.5 AF, for a total of 493.3 AF; of which 271.1 AF are consumed. Divided proportionally, the Department finds that claim no. 41I 94502-00 has a diverted volume of 211.4 AF and a consumed volume of 116.2 AF; and claim no. 41I 94503-00 has a diverted volume of 281.9 AF and a consumed volume of 154.9 AF.

Table 9: Claim Nos. 41A 94502-00 and 41A 94503-00 Historic Use

Water Right #	Priority Date	Purpose/ Acres	Flow Rate	Period of Use	Point of Diversion	Place of Use	Total Historic Diverted Volume for the place of use AF	Total HCV for the POU AF(Including IL)	*Proportional Historic Diverted Volume AF	*Proportional HCV AF (including IL)
41A 94502-00	10/14/1886	340.4	3 CFS	6/1 to 10/15	NWSEN E 34 14S 10W and NWSW NW 11 15S 10W	27, 34, and 35 14S 10W, and 2, 3, and 11 15S 10W	493.3 AF	271.1 AF	211.4 AF	116.2 AF
41A 94503-00	10/14/1886	340.4	4 CFS	6/1 to 10/15	NWSEN E 34 14S 10W and NWSW NW 11 15S 10W	27, 34, and 35 14S 10W, and 2, 3, and 11 15S 10W			281.9 AF	154.9 AF

\*Diverted and consumed volumes were divided between claim nos. 41A 94502-00 and 41A 94503-00 proportionally based on decreed flow rate.

### **Historic Use Change No. 41A 30159796:**

#### **FINDINGS OF FACT**

111. As per ARM 36.12.1902(1)(a), historic information for a statement of claim must be described as it was used prior to July 1, 1973, unless the statement of claim was subject to a previous change in which case it is the date of completion of the change. statement of claim no. 41A 30113656 has not had a post July 1<sup>st</sup>, 1973, change and as such historic use for this claim will be assessed prior to July 1<sup>st</sup>, 1973.

112. Statement of claim 41A 30113656, with the purpose of stock, has a priority date of October 14<sup>th</sup>, 1886, for which 500 AU historically drank directly from Big Sheep Creek in Sections 27 and 34, 14S, 10W and Sections 2, 3, and 11, 15S 10W. The historic consumptive volume associated with the 500 AU is 16.8 AF (500 AU \* 30 GPD \* 365 days/325851 gallon/AF). The flow rate of 10.4 GPM was derived from this volume ((500 AU \* 30 GPD)/(24

hours/day \* 60 minutes/hour)). This use is supported by the Applicant's post-1973 affidavits, post-1973 grazing lease, and pre-1973 grazing evidence in aerial photographs (stock corrals).

113. The Department finds the following historic use:

Table 10: Claim No. 41A 30159796 Historic Use

Water Right #	Priority Date	Purpose	Flow Rate	Period of use	Point of Diversion	Place of use	Diverted Volume	Consumptive Vol.
41A 30113656	10/14/1886	Stock	10.4 GPM	1/1 to 12/31	E2SE 27 14S 10W, E2E2 34 14S 10W, W2W2 2 15S 10W, NWNWNW 11 15S 10W, and E2E2 3 15S 10W	E2SE 27 14S 10W, E2E2 34 14S 10W, W2W2 2 15S 10W, NWNWNW 11 15S 10W, and E2E2 3 15S 10W	16.8 AF	16.8 AF

## CONCLUSIONS OF LAW

114. Applicant seeks to change existing water rights represented by its Water Right claims. The "existing water rights" in this case are those as they existed prior to July 1, 1973, because no changes could have been made to those rights after that date without the Department's approval. § 85-2-402(1), MCA; Royston, supra; Town of Manhattan v. DNRC, Cause no. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) P.g. 7; cf. General Agriculture Corp. v. Moore (1975), 166 Mont. 510, 534 P.2d 859 (limited exception for perfection). Thus, the focus in a change proceeding is what those rights looked like and how they were exercised prior to July 1, 1973. E.g., Matter of Clark Fork River Drainage Area (1992), 254 Mont. 11, 17, 833 P.2d 1120; 85-2-102(12)("Existing right" or "existing water right" means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973). An applicant can change only that to which it has a perfected right. E.g.,

McDonald, supra; Quigley, supra; Town of Manhattan v. DNRC, Cause no. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) P.g. 9 (the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions, *citing Featherman v. Hennessy*, (1911) 43 Mont. 310, and Quigley v. McIntosh, (1940) 110 Mont. 495); see also In re Application for Water Rights in Rio Grande County 53 P.3d 1165, 1170 (Colo. 2002) (while the enlargement of a water right, as measured by historic use, may be injurious to other rights, it also simply does not constitute a permissible “change” of an existing right); Robert E. Beck, 2 Water and Water Rights at § 16.02(b) at p. 271 (issues of waste and historic use, as well as misuse ... properly be considered by the administrative official or water court when acting on a reallocation application,” (citations omitted)); *In the Matter of Application for Change in Appropriation of Water Right no. 1339988-40A, 1339989-40A, and 50641-40A by Careless Creek Ranch* (DNRC Final Order 1988)(where there is water at new point of diversion, more often than not purpose of change is to pick up that extra water, application must be made for a new water right to cover the extra water; it cannot be appropriated under the guise of a change in the old right).

115. The Department as fact finder in a change proceeding must have the required information to evaluate historic use of a water right to determine whether the change will result in expansion of the original right or adversely affect water users. The Department cannot determine whether there will be adverse effect to other appropriators from a different use of water until it knows how the water has been historically used, including the pattern of use. Town of Manhattan v. DNRC, Cause no. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) P.g.13 (upholding ARM 36.12.1902, as reflecting basic water law principles).

The requirement that a water user establish the parameters and pattern of use of a water right through evidence of historic use is a fundamental principle of Montana water law that serves to ensure that a change does not expand a water right (i.e. bootstrap a new use with a senior priority date) or adversely affect other water users. Evidence of historic use serves the important function of protecting other water users who have come to rely upon maintaining

surface and ground water conditions for their livelihood. *Id.* at P.g. 14; *In the Matter of Change Application no. 43D-30002264 by Chester and Celeste Schwend* (DNRC Final Order 2008)(applicant must provide evidence on actual historic use of water right regardless of decree; statement that “we will not be using any more water than was used before” is not sufficient).

116. Water Resources Surveys were authorized by the 1939 legislature. 1939 Mont. Laws Ch. 185, § 5. Since their completion, Water Resources Surveys have been invaluable evidence in water right disputes and have long been relied on by Montana courts. In re Adjudication of Existing Rights to Use of All Water in North End Subbasin of Bitterroot River Drainage Area in Ravalli and Missoula Counties (1999), 295 Mont. 447, 453, 984 P.2d 151, 155 (Water Resources Survey used as evidence in adjudicating of water rights); Wareing v. Schreckendgust (1996), 280 Mont. 196, 213, 930 P.2d 37, 47 (Water Resources Survey used as evidence in a prescriptive ditch easement case); Olsen v. McQueary (1984), 212 Mont. 173, 180, 687 P.2d 712, 716 (judicial notice taken of Water Resources Survey in water right dispute concerning branches of a creek).

117. The Department has adopted a rule providing for the calculation of historic consumptive use where the applicant proves by a preponderance of the evidence that the acreage was historically irrigated. ARM 36.12.1902.

If an applicant seeks more than the historic consumptive use as calculated by ARM 36.12.1902, the applicant bears the burden of proof to demonstrate the amount of historic consumptive use by a preponderance of the evidence. The actual historic use of water could be less than the optimum utilization represented by the calculated duty of water in any particular case. E.g., Application for Water Rights in Rio Grande County 53 P.3d 1165 (Colo., 2002) (historical use must be quantified to ensure no enlargement); *In the Matter of Application to Change Water Right no. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); Orr v. Arapahoe Water and Sanitation Dist. 753 P.2d 1217, 1223 -1224 (Colo., 1988)(historical use of a water right could very well be less than the duty of water); Weibert v. Rothe Bros., Inc., 200 Colo. 310, 317, 618 P.2d 1367, 1371 - 1372 (Colo., 1980) (historical use could be less than the optimum utilization “duty of water”).

118. While evidence may be provided that a particular parcel was irrigated, the actual amount of water historically diverted and consumed is critical. E.g., In the Matter of Application to Change Water Right no. 41H 1223599 by MGRR #1, LLC., supra. The Department cannot assume that a parcel received the full duty of water or that it received sufficient water to constitute full-service irrigation for optimum plant growth. Even when it seems clear that no other rights could be affected solely by a particular change in the location of diversion, it is essential that the change also not enlarge an existing right. Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources 91 P.3d 1058, 1063 (Colo., 2004) (*citing Application for Water Rights in Rio Grande County*, 53 P.3d at 1168 and Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1147 (Colo., 2001)).

119. Absent quantification of annual volume historically consumed, no protective condition limiting annual volume delivered can be placed on a Change Authorization, and without such a condition, the evidence of record will not sustain a conclusion of no adverse effect to prior . . . appropriators.” *In the Matter of the Application for Change of Appropriation Water Rights nos. 101960-41S and 101967-41S by Keith and Alice Royston*, COL no. 8 (DNRC Final Order 1989), *affirmed* (1991), 249 Mont. 425, 428, 816 P.2d 1054, 1057; *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change no. 41H 30000806 by Montana Golf Enterprises, LLC.*, DNRC Proposal for Decision (November 19, 2003) (proposed decision denied change for lack of evidence of historical use; application subsequently withdrawn); see also Hohenlohe ¶¶ 43, 45; Application for Water Rights in Rio Grande County (2002), *supra*; *In the Matter of Application to Change Water Right no. 41H 1223599 by MGRR #1, LLC., supra.*

120. The Department has the authority to consider waste in determining a volume for change in a water right.

*The Department retains the discretion to take into account reasonable or wasteful use and to amend or modify a proposed change of use application according to those determinations. See [Bostwick, 2009 MT 181, ¶ 21, 351 Mont. 26, 208 P.3d 868.](#)*

Hohenlohe ¶ 71.

121. Applicant may proceed under ARM 36.12.1902, the Department's historic consumptive use rule for the calculation of consumptive use or may present its own evidence of historic beneficial use. In this case Applicant has elected to proceed under ARM 36.12.1902. (FOF 97)

122. The Department concludes the Applicant has proven by a preponderance of the evidence the historic use of statement of claim nos. 41A 94502-00 was a diverted volume of 211.4 AF and a flow rate of 3.0 CFS with a consumptive use of 116.2 AF. (FOF 97-110)

123. The Department concludes the Applicant has proven by a preponderance of the evidence the historic use of statement of claim no. 41A 94503-00 was a diverted volume of 281.9 AF and a flow rate of 4.0 CFS with a consumptive use of 154.9 acre-feet. (FOF 97-110)

124. The Department concludes the Applicant has proven by a preponderance of the evidence the historic use of statement of claim no. 41A 30113656 for 500 AU has a diverted and consumed volume of 16.8 AF and a flow rate of 10.4 GPM. (FOF 111-113)

**Adverse Effect Change No. 41A 30154953:**

**FINDINGS OF FACT**

125. The Applicant proposes to retire 3.6 acres of irrigation from E2NE of Section 34 14S 10W during the period of diversion, June 1<sup>st</sup> through October 15<sup>th</sup>. The water used on the retired acres will be changed from irrigation to mitigation and will be left in Big Sheep Creek to offset depletions caused by Provisional Permit 41A 30154952.

126.  $3.6 \text{ retired acres} / 340.4 \text{ historic acres} * 271.1 \text{ AF historic consumptive use} = 2.9 \text{ AF}$ . Additionally, 1.9 AF of diverted non-consumed water will be left instream to offset the return flows associated with the 3.6 retired acres, as described in Groundwater Permit with Mitigation Report. Divided proportionately, 1.9AF of return flow is 0.81 AF from claim 41A 94502-00 and 1.09 AF from claim 41A 94503-00. The place of use for the proposed mitigation is from the historic point of diversion to the start of the affected reach as identified in the Groundwater Permit with Mitigation Report, Melissa Brickl, Groundwater Hydrologist, Water Sciences Bureau, p.g. 11, which is in Sections 2, 3, 11 15S 10W and Sections 34 14S 10W.

127. The Applicant claims there is no period of non-use on statement of claim nos. 41A 94502-00 and 41A 94503-00.

128. The combined historic consumptive use for statement of claim nos. 41A 94502-00 and 41A 94503-00 was 271.1 AF (FOF 110), the new combined consumptive use will also be 271.1 AF (2.9AF for mitigation + 268.2 AF for the unchanged irrigated acres). When split proportionally based on historic flow rate, claim no. 41I 94502-00's historic consumed volume 116.2 AF will remain unchanged (1.2 AF for mitigation + 115.0 AF for the unchanged irrigated acres). claim no. 41I 94503-00's historic consumed volume 154.9 AF will also remain unchanged (1.7 AF for mitigation + 153.2 AF for the unchanged irrigated acres).

129. Per the DNRC Return Flow Memo dated April 1, 2016, an annual return flows analysis was selected because water in this change is left instream so historically diverted flows are available during the historical period of diversion either below the point of diversion or where return flows historically returned to the source. If a valid objection is received, then modeling the monthly timing of return flows will be conducted.

130. The Application will be subject to the following conditions, limitations, or restrictions:

RETIRED ACRE REQUIREMENT: THE APPROPRIATOR'S USE OF WATER UNDER THIS AUTHORIZATION IS CONDITIONED UPON THE 3.6 ACRES RETIRED IN CHANGE APPLICATION NO. 41A 30154953 NOT BEING IRRIGATED BY ANY OTHER WATER RIGHTS, INCLUDING SUPPLEMENTAL STATEMENT OF CLAIM NOS. 41A 72375-00 AND 41A 94501-00, THOSE NOT LISTED IN THE CHANGE, AND FUTURED APPROPRIATIONS OF WATER.

131. The Department finds that Change Application no. 30154953 is not an expansion of the historic use of statement of claim nos. 41A 94502-00 and 41A 94503-00 and will not cause an adverse effect to other water right users.

**Adverse Effect Change no. 41A 30159796:**

**FINDINGS OF FACT**

132. The Applicant proposes to change a portion of statement of claim no. 41A 30113656 to the purpose of mitigation to offset depletions on Big Sheep Creek caused by the proposed Provisional Permit no. 41A 30154952 during the months of April and May. This change would retire 108 AU during the months of April and May, or 0.6 AF of water left in Big Sheep Creek for mitigation ( $108 \text{ AU} * 30 \text{ GPD} * 61 \text{ days} / 325851 \text{ gallon/AF}$ ). The place of use for the proposed mitigation is from the start of the original point of diversion to the start of the affected reach as identified in The Groundwater Permit with Mitigation Report, Melissa Brickl, Groundwater Hydrologist, Water Sciences Bureau, p.g. 11, which is in Sections 2, 3, 11 15S 10W and Sections 34 14S 10W. The remaining 392 AU will continue to drink directly from the source in accordance with historical use during April and May, and 500 AU will be watered during the rest of the year.

133. Under this change, the water left in Big Sheep Creek for mitigation will be equal to the amount of water depleted by proposed Permit no. 41A 30154952 during April and May. There will be no expansion of use in this change.

134. The Department finds that Change Application no. 30159796 is not an expansion of the historic use of statement of claim no. 30113656 and will not cause an adverse effect to other water right users.

#### CONCLUSIONS OF LAW

135. The Applicant bears the affirmative burden of proving that proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation. § 85-2-402(2)(a), MCA. Royston, supra. It is the applicant's burden to produce the required evidence. *In the Matter of Application to Change Water Right no. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

136. Prior to the enactment of the Water Use Act in 1973, the law was the same in that an adverse effect to another appropriator was not allowed. Holmstrom Land Co., Inc., v. Newlan Creek Water District (1979), 185 Mont. 409, 605 P.2d 1060, *rehearing denied*, (1980), 185

Mont. 409, 605 P.2d 1060, *following Lokowich v. Helena* (1913), 46 Mont. 575, 129 P. 1063; *Thompson v. Harvey* (1974), 164 Mont. 133, 519 P.2d 963 (plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); *McIntosh v. Graveley* (1972), 159 Mont. 72, 495 P.2d 186 (appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); *Head v. Hale* (1909), 38 Mont. 302, 100 P. 222 (successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); *Gassert v. Noyes* (1896), 18 Mont. 216, 44 P. 959 (after the defendant used his water right for placer mining purposes the water was turned into a gulch, whereupon the plaintiff appropriated it for irrigation purposes; the defendant then changed the place of use of his water right, resulting in the water no longer being returned to the gulch - such change in use was unlawful because it absolutely deprived the plaintiff of his subsequent right).

The cornerstone of an evaluation of adverse effect to other appropriators is the determination of historic use of water. One cannot determine whether there is adverse effect to another appropriator until one knows what the historic water right is to be changed. It is a fundamental part of Montana and western water law that the extent of a water right is determined by reference to the historic beneficial use of the water right. *McDonald*; *Town of Manhattan v. DNRC*, Cause no. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review* (2011) P.g.13; *City of Bozeman* (DNRC), *supra*; *Application for Water Rights in Rio Grande County*, 53 P.3d 1165, 1170 (Colo. 2002). The Montana Supreme Court has explained:

An appropriator historically has been entitled to the greatest quantity of water he can put to use. *Sayre v. Johnson*, 33 Mont. 15, 18, 81 P. 389, 390 (1905). The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. *In re Adjudication of Existing Rights to the Use of All Water*, 2002 MT 216, ¶ 56, 311 Mont. 327, 55 P.3d 396; see also § 85-2-311(1)(d), MCA. This limitation springs from a fundamental tenet of western water law-that an appropriator has a right only to that

amount of water historically put to beneficial use-developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights. [Spokane Ranch and Water Co. v. Beatty, 37 Mont. 342, 351, 96 P. 727, 731 \(1908\)](#)....

The question of adverse effect under [§§ 85-2-402\(2\) and -408\(3\), MCA](#), implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow...

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe ¶¶ 43-45.

The Colorado Supreme Court has repeatedly addressed this same issue of historic use and adverse effect. E.g., Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo.1999); Orr v. Arapahoe Water and Sanitation Dist., 753 P.2d 1217, 1223 (Colo.1988).

The Colorado Supreme Court has consistently explained:

“A classic form of injury involves diminution of the available water supply that a water rights holder would otherwise enjoy at the time and place and in the amount of demand for beneficial use under the holder's decreed water right operating in priority.” (citations omitted) . . .

... it is inherent in the notion of a “change” of water right that the property right itself can only be changed and not enlarged. (citation omitted). The appropriator of native water may not enlarge an appropriation without establishing all of the elements of an independent appropriation, which will necessarily have a later priority date (citation omitted) ...

... diversions are implicitly limited in quantity by historic use at the original decreed point of diversion...

...we have explained this limitation by noting that “over an extended period of time a pattern of historic diversions and use under the decreed right at its place of use will mature and become the measure of the water right for change purposes.” (citation omitted). The right to change a point of diversion is therefore limited in quantity by the historic use at the original point of diversion. (citations omitted) “Thus, a senior appropriator cannot enlarge the historical use of a water right by changing the point of diversion and then diverting from the new location the full amount of water decreed to the original point of diversion, even though the historical use at the original point of diversion might have been less than the decreed rate of diversion.”

FN9. The term “historic use” refers to the “historic consumptive use,” (citations omitted).

Application for Water Rights in Rio Grande County, 53 P.3d at 1169-1170.

137. Consumptive use of water may not increase when an existing water right is changed. E.g., Town of Manhattan v. DNRC, Cause no. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, (2011) P.g.9; *In the Matter of Application to Change a Water Right no. 40M 30005660 by Harry Taylor II And Jacqueline R. Taylor*, (DNRC Final Order 2005); *In the Matter of Application to Change a Water Right no. 41I 30002512 by Brewer Land Co, LLC*, DNRC Proposal For Decision adopted by Final Order (2003).

Applicant must provide evidence of historical amount consumed and the amount to be consumed under the proposed change. *In the Matter of the Application of Beneficial Water Use Permit Number 41H 30003523 and the Application for Change no. 41H 30000806 by Montana Golf Enterprises, LLC.*, DNRC Proposal for Decision (2003) (application subsequently withdrawn); *In the Matter of Application to Change A Water Right no. 43B 30002710 by USA (Dept. of Agriculture – Forest Service)* (DNRC Final Order 2005); *In the Matter of Application no. 76H-30009407 to Change Water Right nos. 76H-108772 and 76H-1-8773 by North Corporation* (DNRC Final Order 2008).

#It is well settled in Montana and western water law, that once water leaves the control of the appropriator whether through seepage, percolating, surface, or waste waters,” and reaches a water course, it is subject to appropriation. E.g., Rock Creek Ditch and Flume Co. v. Miller (1933), 93 Mont. 248, 17 P.2d 1074, 1077; Newton v. Weiler (1930), 87 Mont. 164, 286 P. 133;

Popham v. Holloron (1929), 84 Mont. 442, 275 P. 1099, 1102; Galiger v. McNulty (1927) 80 Mont. 339, 260 P. 401; Head v. Hale (1909), 38 Mont. 302, 100 P. 222; Alder Gulch Con. Min. Co. v. King (1886), 6 Mont. 31, 9 P. 581; Doney, *Montana Water Law Handbook* (1981) [hereinafter Doney] p.22 (if return flows not part of original appropriation then it is available for appropriation by others); see also Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185. An intent to capture and reuse return flows must be manifested at the time of the appropriation. E.g., Rock Creek Ditch and Flume, 17 P.2d at 1080; Albert Stone, *Montana Water Law* (1994) p. 84. This is consistent with the cornerstone of the prior appropriation doctrine that beneficial use is the basis, the measure and limit of a water right. E.g., McDonald v. State (1986), 220 Mont. 519, 722 P.2d 598; Toohy v. Campbell (1900), 24 Mont. 13, 60 P. 396. Return flows are not part of the water right of the appropriator changing their water right and an appropriator changing their water right is not entitled to return flows in a change in appropriation. Generally, return flow is water that is not consumed or is lost to the system. See also, Doney, p. 21.

The Montana Supreme Court also recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31,43, 198 P.3d 219, ¶¶ 22, 31,43, citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; see discussion in Hohenlohe, supra.

138. The analysis of return flow is a critical component of a change in appropriation and specifically whether a change will cause adverse effect to another appropriator. A change can affect return flow patterns and timing, affecting other water users. E.g., *In the Matter of Application to Change Appropriation Water Right no.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991). An applicant for a change in appropriation must analyze return flows (amount, location, and timing) to prove that the proposed change does not adversely affect other

appropriators who may rely on those return flows as part of their water supply to exercise their water rights. E.g., Royston, supra; In the Matter of Change Application no. 43D-30002264 by Chester and Celeste Schwend (DNRC Final Order 2008) (applicant must show that significant changes in timing and location of historic return flow will not be adverse effect.) The level of analysis of return flow will vary depending on the nature of the change application. Hohenlohe ¶¶ 45-46, 55-56.

139. The Department concludes the Applicant has proven by a preponderance of the evidence that the proposed Change Application nos. 41A 30154953 and 41A 30159796 will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. § 85-2-402(2)(b), MCA. (FOF 125-134)

**Adequate Diversion Change Nos. 41A 30154953 and 41A 30159796:**

**FINDINGS OF FACT**

140. The proposed changes leave a portion of existing irrigation and stock water rights instream in order to offset depletions to Big Sheep Creek created by the proposed Provisional Permit 41A 30154952. No diversion facilities are required to leave water instream as part of the mitigation plan.

141. The Department finds that the Applicant has adequate diversion facilities for the beneficial use proposed in Change Applications nos. 41A 30154953 and 41A 30159796.

**CONCLUSIONS OF LAW**

142. Pursuant to § 85-2-402 (2)(b), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to benefit the fishery resource pursuant to § 85-2-436, MCA, or a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit the fishery resource pursuant to § 85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant to § 85-2-320, MCA, the Applicant must prove by a preponderance of the evidence that

the proposed means of diversion, construction, and operation of the appropriation works are adequate. The adequate means of diversion statutory test merely codifies and encapsulates the common law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit no. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1) (a), MCA; see also, *In the Matter of Application to Change a Water Right no. G129039-76D by Keim/Krueger* (DNRC Final Order 1989)(whether party presently has easement not relevant to determination of adequate means of diversion); *In the Matter of Application for Beneficial Water Use Permit no. 69141-76G by Silver Eagle Mining* (DNRC Final Order 1989) (collection of snowmelt and rain in lined ponds considered adequate means of diversion); *In the Matter for Application to Change a Water Right no. 101960-41S by Royston* (DNRC Final Order 1989)(irrigation system is designed for flow rates of 750 GPM, and maximum usage allowed during non-high water periods, is 144-247 GPM, and the evidence does not show that the system can be operated at the lower flow rates; diversion not adequate), *affirmed*, Matter of Application for Change of Appropriation Water Rights nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054; *In the Matter of Application for Beneficial Water Use Permit no. 41C-11339900 by Three Creeks Ranch of Wyoming LLC* (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate); *In the Matter of Application for Beneficial Water Use Permit no. 43B-30002710 by USDA* (DNRC Final Order 2005) (specific ditch segments would be adequate after completion of maintenance and rehabilitation work).

Adequate diversions can include the requirement to bypass flows to senior appropriators. E.g., *In the Matter of Application for Beneficial Water Use Permit no. 61293-40C by Goffena* (DNRC Final Order 1989) (design did not include ability to pass flows, permit denied).

143. The Department concludes the Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-402 (2)(b), MCA. (FOF 140-141)

**Beneficial Use Change nos. 41A 30154953 and 41A 30159796**

**FINDINGS OF FACT**

144. Per MCA § 85-2-102(5)(e) and (16), water used for mitigation, which is defined as the reallocation of surface water or ground water through a change in appropriation right or other means that does not result in surface water being introduced into an aquifer through aquifer recharge to offset adverse effects resulting from net depletion of surface water; is a beneficial use of water.

145. These Change Applications seek to provide mitigation water for Beneficial Water Use Permit 41A 30154952, which will result in 3.5 AF of annual depletions to Big Sheep Creek. Proposed Change 41A 30154953 will discontinue irrigation on 3.6 acres leaving 2.9 AF of water in Big Sheep Creek to offset the potential depletions during the irrigation season (June-October). Proposed Change 41A 30159796 will reduce the number of stock watering from surface water originating in Big Sheep Creek from 500 AU to 392 AU for the months of April and May, leaving 0.6 AF in Big Sheep Creek to offset potential depletions in those two months. The proposed changes will provide mitigation water to Big Sheep Creek from April to October, with a volume of 3.5 AF.

146. The Department finds the proposed changes to the purpose of mitigation are a beneficial use.

**CONCLUSIONS OF LAW**

147. Under the change statute, § 85-2-402(2)(c), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. An appropriator may appropriate water only for a beneficial use. §§ 85-2-301 and 311(1)(d), MCA.

148. The analysis of the beneficial use criterion is the same for change authorizations under § 85-2-402, MCA, and new beneficial permits under § 85-2-311, MCA. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause

no. BDV-2002-519, Montana First Judicial District Court (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; Quigley; Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) P.g. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); *In the Matter of Application for Beneficial Water Use Permit no. 76H-84577 by Thomas and Janine Stellick*, (DNRC Final Order 1995)(permit denied because no evidence in the record that the amount of water needed for fish and wildlife; absence of evidence of waste does not meet the standard of proof); *In the Matter of Application no. 40A-108497 by Alex Matheson*, DNRC Proposal for Decision adopted by Final Order (2000) (application denied as to fishery and recreation use for lack of proof); *In the Matter of Application for Beneficial Water Use Permit no. 76LJ-115-831 by Benjamin and Laura Weidling*, (DNRC Final Order 2003), *aff'd on other grounds*, In the Matter of Application for Beneficial Water Use Permit no. 76LJ-115-83100 by Benjamin and Laura Weidling and no. 76LJ-1158300 by Ramona S. and William N. Nessly, *Order on Motion for Petition for Judicial Review*, Cause no. BDV-2003-100, Montana First Judicial District (2004) (fish and wildlife use denied for lack of proof); *In the Matter of Application for Beneficial Water Use Permit 76LJ 30008762 by Vinnie J and Susan N Nardi*, DNRC Proposal for Decision adopted by Final Order (2006); statement of Opinion, *In the Matter of Beneficial Water Use Permit no. 41H-30013678 by Baker Ditch Company* (June 11, 2008)(change authorization denied - no credible evidence provided on which a determination can be made of whether the quantity of water requested is adequate or necessary to sustain the fishery use, or that the size or depth of the ponds is adequate for a fishery); *In The Matter Of Application For Beneficial Water Use Permit no. 43C 30007297 By Dee Deaterly*, DNRC Final Order (2007), *aff'd on other grounds*, Deaterly v. DNRC et al., Cause no. BDV-2007-186, Montana First Judicial District, *Nunc Pro Tunc Order on Petition for Judicial Review* (2008) (permit denied in part because of failure to support quantity of water needed for pond); *In The Matter of Change Application no. 43D-30002264 by Chester and Celeste Schwend* (DNRC Final Order 2008) (when adding new

water rights to land already irrigated by other water rights, applicant must show that all of the proposed rights together are needed to irrigate those lands);.

The Department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. §85-2-312, MCA; see also, McDonald; Toohey. Waste is defined to include the “application of water to anything but a beneficial use.” § 85-2-102(23), MCA. An absence of evidence of waste does not prove the amount requested is for a beneficial use. E.g., Stellick, supra.

149. It is the Applicant’s burden to prove the required criteria. Royston. A failure to meet that affirmative burden does not mean the criterion is met for lack of contrary evidence. E.g., *In the Matter of Application to Change Water Right no. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

150. The Applicant proposes to use water for mitigation which is a recognized beneficial use. § 85-2-102(5), MCA. The Department concludes the Applicant has proven by a preponderance of the evidence mitigation is a beneficial use and that the requested volume 3.5 AF of water is the amount needed to sustain the beneficial use . § 85-2-402(2)(c), MCA. (FOF 144-146)

### **Possessory Interest**

#### **FINDINGS OF FACT**

151. The Applicant signed the affidavit on the application affirming that they have possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. This is corroborated by The State of Montana Ownership Records.

152. The Department finds that The Applicant has shown possessory interest in the property where the water is to be put to beneficial use.

#### **CONCLUSIONS OF LAW**

153. Pursuant to § 85-2-402(2)(d), MCA, except for a change in appropriation right for instream flow to protect, maintain, or enhance stream flows to benefit the fishery resource pursuant to § 85-2-436, MCA, or a temporary change in appropriation right authorization pursuant to § 85-2-408, MCA, or a change in appropriation right to instream flow to protect, maintain, or enhance stream flows pursuant to § 85-2-320, MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

154. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct; and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

155. The Department concludes the Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-402(2)(d), MCA. (FOF 151-152)

### **PRELIMINARY DETERMINATION**

Subject to the terms and analysis in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit no. 41A 30154952 and Change Application nos. 41A 30154953 and 41A 30159796 should be **GRANTED**.

### **BENEFICIAL WATER USE PERMIT**

The Department determines the Applicant may for the purposes of Beneficial Water Use Permit no. 41A 30154952 divert water from groundwater, by means of a ground water pond from January 1<sup>st</sup> to December 31<sup>st</sup> with a total volume of 19.2 AF, from a point in the W2SENE of Section 34 14S 10W, for Fisheries use from January 1<sup>st</sup> to December 31<sup>st</sup>. The place of use is located in the W2SENE of Section 34, 14S, 10W, Beaverhead County.

The area that will be depleted is located along the Big Sheep Creek in the reach downstream of NE of Section 34 14S 10W. Change Application nos. 41A 30154953 and 41A 30159796 will mitigate the affected reach. The Department determines Change Application nos. 41A 30154953 and 41A 30159796 are sufficient in quantity, location, and timing to offset any potential adverse effects caused by the grant of this Beneficial Use Permit.

The application will be subject to the following conditions, limitations, or restrictions:

1. MITIGATION REQUIREMENT: THE APPROPRIATOR'S USE OF WATER UNDER THIS PERMIT IS CONDITIONED UPON THE 3.5 AC-FT OF MITIGATION VOLUME REQUIRED TO OFFSET ADVERSE EFFECTS FROM NET DEPLETION TO THE BIG SHEEP CREEK DURING APRIL-OCTOBER AT W2SENE SEC 34 14S 10W. DIVERSION UNDER THIS PERMIT MAY NOT COMMENCE UNTIL THE MITIGATION PLAN AS SPECIFICALLY DESCRIBED IN CHANGE AUTHORIZATION NOS. 41A 30154953 AND 41A 30159796 ARE AUTHORIZED AND IMPLEMENTED. DIVERSION UNDER THIS

PERMIT MUST STOP IF MITIGATION AS HEREIN REQUIRED IN AMOUNT, LOCATION AND DURATION CEASES.

2. FISH WILDLIFE AND PARKS FISH POND LICENSE REQUIREMENT: THE APPROPRIATOR SHALL ENSURE THAT THE POND IS PLANTED WITH LEGALLY OBTAINED FISH AND THAT A PRIVATE FISH POND LICENSE IS OBTAINED AND SUBMITTED AT PROJECT COMPETITION, AFTER WHICH THIS CONDITION WILL BE REMOVED.

### **AUTHORIZATION OF CHANGE IN APPROPRIATION RIGHT**

The Department determines the Applicant may for the purposes of Change Application no. 41A 30154953 change the purpose of 1.2 AF of water use from statement of claim no. 41A 94502-00 and 1.7 AF of water use from claim no. 41A 94502-00 from irrigation to mitigation over the period of diversion June 1<sup>st</sup> through October 15<sup>th</sup>. This will be done by retiring 3.6 acres of land historically irrigated by both statement of claim nos. 41A 94502-00 and 41A 94502-00 in the E2NE of Section 34 14S10W.

The Application will be subject to the following conditions, limitations, or restrictions:

1. RETIRED ACRE REQUIREMENT: THE APPROPRIATOR'S USE OF WATER UNDER THIS AUTHORIZATION IS CONDITIONED UPON THE 3.6 ACRES RETIRED IN CHANGE APPLICATION NO. 41A 30154953 NOT BEING IRRIGATED BY ANY OTHER WATER RIGHTS, INCLUDING SUPPLEMENTAL STATEMENT OF CLAIM NOS. 41A 72375-00 AND 41A 94501-00, THOSE NOT LISTED IN THE CHANGE, AND FUTURE APPROPRIATIONS OF WATER.

2. Additionally, the Department will add the following information remark to statement of claim nos. 41A 94502-00 and 41A 94503-00:

1.9 AF OF WATER THAT WAS HISTORICALLY DIVERTED AND BENEFICIALLY USED WILL NO LONGER BE DIVERTED UNDER CHANGE AUTHORIZATION 41A 30154953. INSTEAD, 1.9 AF OF WATER WILL BE LEFT INSTREAM IN THE BIG SHEEP CREEK AT THE HISTORIC POINT OF DIVERSION DURING THE PERIOD OF DIVERSION, 0.81 AF FROM 41A 94502-00 AND 1.09 AF FROM 41A 94503-00.

The Department determines the Applicant may, for the purposes of Change Application no. 41A 30159796, change the purpose of 0.6 AF of water during April 1<sup>st</sup> through May 31<sup>st</sup> from stock to mitigation purpose. This will be done by reducing the number of stock watering from Big Sheep Creek on statement of claim no. 41A 30113656 down from 500 AU to 392 AU over the stated period. The water right will remain unchanged outside of this period.

### **NOTICE**

This Department will provide public notice of this Combined Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Combined Application pursuant to §§ 85-2-307, and -308, MCA. If this Combined Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Combined Application as herein approved. If this Combined Application receives a valid objection, the Combined Application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to a combined application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the combined application, the department will grant the combined application subject to conditions necessary to satisfy applicable criteria based on the preliminary determination.

DATED this 30th day of November, 2023.

/Original Signed by Jennifer Daly/

Jennifer Daly, Manager

Helena Regional Office

Department of Natural Resources and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 30th day of November 2023, by first class United States mail.

THUNDER RIVER RANCH LLC  
6886 WING POINT RD NE  
BAINBRIDGE ISLAND, WA 98110-2985

WILL MOORE  
DMS NATURAL RESOURCES  
602 S. FERGUSON AVE. SUTE 2  
BOZEMAN MT 59718-6483

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NAME

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DATE